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VIETNAM STRESS SYNDROME AND THE CRIMINAL DEFENDANT

"I began to wonder what they really had against Kurtz. It wasn't just insanity and murder—there was enough of that to go around for everybody."—Captain Willard in "Apocalypse Now"

I. INTRODUCTION

A "new" defense to criminal actions has emerged in recent years which has been called Vietnam Stress Syndrome or Vietnam Stress Disorder. Its proper name is Post-traumatic Stress Disorder (PTSD).¹ It is not actually a defense in its own right; rather, it is a mental disorder which may be considered a mitigating factor in sentencing, a ground for a new trial or a basis for an insanity defense.

Most cases of Vietnam Stress Syndrome are not likely to qualify as insanity under the "right or wrong" test of *M'Naghten's Case*² and will fare little better under the Irresistible Impulse³ and American Law Insti-

1. Post-traumatic Stress Disorder (PTSD)—the proper name for Vietnam Stress Syndrome—is anything but new, even though it was not formally recognized until recently. See *infra* note 14. Indeed, R.J. Daly identified a potential seventeenth century case of PTSD. He postulated that Samuel Pepys' diary account of the Great Fire of London in 1666 chronicles Pepys' development of Post-traumatic Stress Disorder as a result of the fire. See generally Daly, *Samuel Pepys and Post-Traumatic Stress Disorder*, 143 BRIT. J. PSYCHIATRY 64 (1983). See *infra* note 14 and accompanying text.

2. *M'Naghten's Case*, 10 Clark & Fin. 200, 208, 8 Eng. Rep. 718, 722 (1843). *M'Naghten* was the first case to formulate a legal test for insanity. The *M'Naghten* test is based upon the *M'Naghten* trial judges' answers to five questions posed by the House of Lords regarding criminal responsibility. The judges responded:

"[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

People v. Horn, 158 Cal. App. 3d 1014, 1021, 205 Cal. Rptr. 119, 123 (1984) (quoting *M'Naghten*, 10 Clark & Fin. at 210, 8 Eng. Rep. at 722).

3. The Irresistible Impulse test extends the insanity defense to situations where the defendant was incapable, by reason of mental disease or defect, of controlling his conduct. See, e.g., *Davis v. State*, 161 Tenn. 23, 28 S.W.2d 993 (1930) (defendant incapable of controlling his actions due to delusions held not guilty of second-degree murder although he knew right from wrong). This test is generally used in conjunction with the *M'Naghten* test. See, e.g., *Pierce v. Turner*, 402 F.2d 109 (10th Cir. 1968), *cert. denied*, 394 U.S. 950 (1969); *Commonwealth v. McHoul*, 352 Mass. 544, 226 N.E.2d 556 (1967).

tute (ALI) tests.⁴ Although PTSD cases may be more likely to qualify for a Diminished Capacity defense,⁵ this defense is not recognized in all states.⁶ A possible defense, which is related to diminished capacity, is unconsciousness.⁷ However, it is questionable whether or not it may be

4. The ALI test codifies a combination of the *M'Naghten* and the Irresistible Impulse tests. The ALI test provides:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

5. Diminished capacity is the lack of mental capacity to form the necessary intent in a specific intent crime. *People v. Gorshen*, 51 Cal. 2d 716, 727, 336 P.2d 492, 499-500 (1959), *overruled by statute*, CAL. PENAL CODE § 25 (West Supp. 1985). It differs from lack of specific intent in that expert testimony may be introduced not only to show that the defendant did not have the requisite intent at the time the crime was committed, but that the defendant could not have the intent due to his mental condition. *Id.* Thus, the expert may testify about the defendant's mental condition in general and his testimony is not limited to the defendant's mental condition at the time of the crime.

6. For example, a 1982 California Ballot Initiative, Proposition 8, added § 25 to the California Penal Code. Section 25 states, in pertinent part:

(a) The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.

CAL. PENAL CODE § 25(a) (West Supp. 1985).

However, § 25 does not prevent a defendant from introducing evidence that he lacked the required intent when a specific intent crime is charged. CAL. PENAL CODE § 28(a) (West Supp. 1985). *See also* CAL. ATTORNEY GENERAL'S OFFICE, ATTORNEY GENERAL'S GUIDE TO PROPOSITION 8, at 8-2 to 8-4 (June 9, 1982).

7. The defense of unconsciousness, like insanity, deals with the issue of whether the defendant is capable of committing a crime at all and, therefore, is a complete defense. MODEL PENAL CODE § 2.01 provides in pertinent part:

(1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.

(2) The following are not voluntary acts within the meaning of this Section:

....

(b) a bodily movement during unconsciousness or sleep;

....

(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

....

MODEL PENAL CODE § 2.01 (Proposed Official Draft 1962).

The defense of unconsciousness is also known as "automatism." Erlinder, *Post-Traumatic Stress Disorder—Vietnam Veterans and the Law: A Challenge to Effective Representation*, 1 BEHAV. SCI. & L., Summer 1983, at 25, 43; Howe, *Psychiatric Evaluation of Offenders Who Commit Crimes While Experiencing Dissociative States*, 8 L. & HUM. BEHAV. 253, 255-56 n.10 (1984).

used in conjunction with PTSD in jurisdictions which do not allow diminished capacity.⁸

PTSD's value as grounds for a new trial may also vary from jurisdiction to jurisdiction. Cases show that a defendant's failure to raise the issue of Vietnam Stress Syndrome initially may preclude its being raised at a later date,⁹ even though it was not recognized as a treatable disorder until October 8, 1980.¹⁰ Further, the use of Vietnam Stress Syndrome as a mitigating factor in sentencing may well depend on the personal feelings of a judge or jury toward Vietnam veterans.¹¹

Additionally, PTSD is often thought of as a "novel" defense and, therefore, not as credible as other more traditional defenses which have the advantage of having been developed and tested over the years.¹² Once a court views a defense as a novelty, it is less likely to believe or even admit evidence of that defense. It is, needless to say, quite difficult to prove a defense with no evidence. PTSD is also easy to misuse as a defense, precisely because it is so new and difficult to prove.¹³

Although many of the same problems arise with the use of any mental condition in a criminal proceeding, Vietnam Stress Syndrome has several aspects which make it unique. This Comment will explore what makes Vietnam Stress Syndrome unique and why, or if, it should be treated as such.

II. WHAT IS VIETNAM STRESS SYNDROME?

A. Diagnostic Criteria

Vietnam Stress Syndrome is the common name given to Post-traumatic Stress Disorder (PTSD) when suffered by veterans of the Vietnam War as a result of their Vietnam experiences.¹⁴ Post-traumatic Stress

8. Although California allows the defense of unconsciousness, in a California Vietnam Stress Syndrome case which used this defense, the court analogized it to diminished capacity. *See infra* notes 81-84 and accompanying text. *See also* CAL. PENAL CODE § 26 (West 1970 & Supp. 1985).

9. *See infra* text accompanying notes 171 & 179-84.

10. *See infra* note 14.

11. *See infra* notes 203 & 208-15 and accompanying text.

12. *See infra* text accompanying notes 118-19.

13. *See generally infra* text accompanying notes 24-33 & 228-31.

14. Prior to the recognition of PTSD as an actual mental disorder in October of 1980, THE AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) [hereinafter cited as DSM III], war veterans whose stress symptoms persisted were considered to be suffering from some sort of neurotic or psychotic illness or from a personality disorder. This was the result of combat stress' prior classification as "gross stress reaction," a condition which subsides as the situational stress subsides. Lipkin, Scurfield & Blank, *Post-Traumatic Stress Disorder in Vietnam Veterans: Assessment in a Forensic Setting*, 1

Disorder is a disorder which may be suffered following a traumatic event which is outside the normal realm of human experiences. These events may be such things as rape, assault, military combat, natural disasters or deliberate man-made disasters such as torture, bombing and death camps. These events are known as "stressors."¹⁵ Stressors of human origin, such as war and military combat, produce more severe and longer lasting disorders than do natural disasters.¹⁶

The symptoms of PTSD are many and varied. Perhaps the best known symptom is the re-experiencing of the traumatic event, which can occur either through recollections of the event, recurrent dreams of the event or a sudden acting out or feeling that the traumatic event is actually occurring at the moment. This last possibility is known as a "dissociative state" and is the rarest symptom of PTSD, occurring only in extreme cases.¹⁷ Dreams and recollections are far more common.¹⁸ Numbing of responsiveness to, or involvement in, the outside world is another symptom of PTSD. The person is no longer interested in things he once was and may experience a change of values.¹⁹ Additional symptoms include: hyperalertness or exaggerated startle response; sleep disturbances; guilt about the person's own survival or about the tactics which the person used in order to survive; memory impairment and difficulty concentrating; and avoidance of activities which may cause the person to recall the stressful event.²⁰ Any and all symptoms may also be intensified by exposure to events which resemble the stressor.²¹ This becomes particularly important in terms of the dissociative state and criminal behavior.²² Other problems associated with PTSD, which become significant when viewed in the context of criminal behavior, are the person's tendency toward increased irritability, impulsive behavior and un-

BEHAV. SCI. & L. 51, 52 (1983) [hereinafter cited as Lipkin] (citing THE AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2d ed. 1968) [hereinafter cited as DSM II]). A persistent failure to adjust following the stressful situation indicated a more severe underlying disturbance. *Id.* (citing DSM II, *supra*). The inability to reconcile recognized diagnoses with the stress reactions of Vietnam veterans influenced the development of DSM III, *supra*. *Id.* at 53.

15. DSM III, *supra* note 14, at 236.

16. *Id.*

17. *Id.* See also Wilson & Ziegelbaum, *The Vietnam Veteran on Trial: The Relation of Post-Traumatic Stress Disorder to Criminal Behavior*, 1 BEHAV. SCI. & L. 69, 71 ("[T]he re-experiencing of the traumatic episode is the *sine qua non* [an indispensable requisite] of PTSD.").

18. DSM III, *supra* note 14, at 236.

19. *Id.* at 238.

20. *Id.* at 236-37.

21. *Id.*

22. Wilson & Ziegelbaum, *supra* note 17, at 71, 73-74.

predictable explosions of aggression with little or no provocation.²³

B. Problems of Misdiagnosis

In a legal context, being aware of PTSD is not enough; the problem is to prove or disprove its existence. The symptoms of PTSD are the same or similar to those of many other disorders, and consequently, PTSD is often misdiagnosed.²⁴ PTSD is a newly recognized disorder about which relatively little is known. It requires particular expertise to diagnose and treat and the fact that someone is a psychiatrist or psychologist does not necessarily qualify him to deal with the disorder.²⁵ Most people experienced in dealing with PTSD, especially as applied to Vietnam veterans, are working in conjunction with the Veterans Administration. Yet these experienced professionals may not qualify as "experts" in the legal sense, while those who have never dealt with the disorder may qualify.²⁶ Consequently, PTSD may be misdiagnosed as an anxiety or depressive disorder,²⁷ an antisocial personality disorder,²⁸ schizopre-

23. DSM III, *supra* note 14, at 238.

24. Aside from the diagnostic problems inherent in PTSD itself, *see infra* notes 27-31 and accompanying text, prior to 1980 the disorder was not formally recognized by the American Psychiatric Association. *See supra* note 14. As a psychiatrist or psychologist may only diagnose a condition or disorder which has been recognized by the American Psychiatric Association in the Diagnostic and Statistical Manual, a proper diagnosis prior to 1980 was virtually impossible.

25. Walker & Cavenar, *Vietnam Veterans, Their Problems Continue*, 170 J. NERVOUS & MENTAL DISEASE 174, 176 (1982) ("the differential diagnosis for PTSD in combat veterans is one of the most challenging tasks of modern psychiatry").

26. Rule 702 of the Federal Rules of Evidence provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

This would seem to indicate that a psychiatrist or psychologist must have training and experience with PTSD in order to testify. It also would appear that a person who is neither a psychiatrist nor a psychologist could testify as an expert if he had training and expertise in the area. Yet, neither is necessarily true. Generally, any psychiatrist may qualify as an expert on mental disorders, and a non-psychiatrist or psychologist may not qualify, regardless of his experience with the particular disorder in question. *See infra* notes 128-30 and accompanying text.

27. PTSD has symptoms of depression and anxiety which may be sufficiently severe to be diagnosed as either of these disorders. DSM III, *supra* note 14, at 237; Atkinson, Henderson, Sparr & Deale, *Assessment of Viet Nam Veterans for Posttraumatic Stress Disorder in Veterans Administration Disability Claims*, 139 AM. J. PSYCHIATRY 1118, 1120 (1982) [hereinafter cited as Atkinson & Henderson].

28. Walker, *Viet Nam Combat Veterans with Legal Difficulties: A Psychiatric Problem?*, 138 AM. J. PSYCHIATRY 1384, 1385 (1981) ("Because of the combat veteran's hostile attitude, tendency to have difficulty with authority figures, history of drug and alcohol abuse, and frequent difficulty with the law, the erroneous diagnosis of antisocial personality disorder is often

nia²⁹ or an hysterical neurosis.³⁰ Additionally, alcohol and drug abuse, common in PTSD sufferers, may mask PTSD symptoms and make the diagnosis even more difficult.³¹

The problems of misdiagnosis arise in two situations: (1) the person may be diagnosed as suffering from another condition when in fact he is suffering from PTSD;³² or (2) the person may be diagnosed as suffering from PTSD when in fact he is suffering from another condition or even none at all.³³ Both of these possibilities present very real problems in a legal context.

III. PTSD AND CRIMINAL BEHAVIOR

Statistics indicate that incidents of PTSD among Vietnam veterans are far more prevalent than is generally assumed. Estimates indicate that from thirty to seventy percent of all Vietnam veterans experience PTSD.³⁴ Other estimates indicate that 29,000 Vietnam veterans are in federal prison,³⁵ approximately 37,500 are on parole, 250,000 are on probation and 87,000 are awaiting trial.³⁶ Some believe that as many as twenty-five percent of all men in prison are Vietnam era veterans.³⁷ Yet, despite the national tragedy these statistics indicate, studies regarding the relationship between PTSD and criminal behavior are still very limited.

One two-year study conducted by John P. Wilson, Ph.D., and Sheldon D. Zigelbaum, M.D., does assess the relationship between certain

made."); Walker & Cavenar, *supra* note 25, at 176; Atkinson & Henderson, *supra* note 27, at 1120.

29. Walker & Cavenar, *supra* note 25, at 175-76 ("Psychotic-like states characterized by violent outbursts, paranoid ideation, and chaotic behavior can be confused with schizophrenia . . .").

30. *Id.* at 175 ("dissociative reactions of individuals suffering from PTSD may simulate an atypical psychosis (hysterical neurosis)"); Atkinson & Henderson, *supra* note 27, at 1120.

31. Walker & Cavenar, *supra* note 25, at 176 ("Alcoholism and drug abuse may mask PTSD. Reports indicate that at least 30 per cent of combat veterans have difficulty with alcoholism . . .").

32. See generally *infra* notes 157-65 & 177-84 and accompanying text.

33. See generally *infra* notes 228-35 and accompanying text.

34. Wilson & Zigelbaum, *supra* note 17, at 70 (citing A. EGENDORF, C. KADUSHIN & R. LAUFER, LEGACIES OF VIETNAM: COMPARATIVE ADJUSTMENT OF VETERANS AND PEERS (1981)).

35. Walker, *supra* note 28, at 1384 (citing STAFF OF HOUSE COMM. ON VETERANS AFFAIRS, 96TH CONG., 1ST SESS., PRESIDENTIAL REVIEW MEMORANDUM ON VIETNAM ERA VETERANS (Comm. Print 1979)).

36. Walker, *supra* note 28, at 1384 (citing President's Message to Congress, Vietnam Era Veterans, 14 WEEKLY COMP. PRES. DOC. 1737-42 (Oct. 10, 1978)).

37. State v. Felde, 422 So. 2d 370, 377 (La. 1982). See *infra* notes 97-109 and accompanying text for a discussion of this case.

aspects of PTSD and criminal behavior.³⁸ Wilson and Zigelbaum have broken down the types of PTSD suffered by Vietnam veterans into nine separate syndromes.³⁹ These are: (1) Depression and Suicidal Syndrome;⁴⁰ (2) Isolation and Withdrawal Syndrome;⁴¹ (3) Sensation Seeking Syndrome;⁴² (4) Paranoid State Syndrome;⁴³ (5) Profound Psychic Numbing Syndrome;⁴⁴ (6) Alienation and Cynicism Syndrome;⁴⁵ (7) Problem of Intimacy Syndrome;⁴⁶ (8) Fusion of Stress Syndrome with Pre-morbid Disposition Syndrome;⁴⁷ and (9) Prosocial-Humanitarian Syndrome.⁴⁸

Several studies indicate that varying factors in the individual and in their Vietnam experiences account for the different types of stress response.⁴⁹ Likewise, the type of response the individual manifests affects

38. Wilson & Zigelbaum, *supra* note 17.

39. Wilson & Zigelbaum, *supra* note 17, at 72-73.

40. With this syndrome, the person feels helpless, depressed, hopeless and dejected. He may also manifest other classical signs of depression such as sleeping problems. *Id.* at 72.

41. The person prefers to live alone and away from others. He tends to seek a self-contained lifestyle and may maintain the hyperalertness which he developed in Vietnam. *Id.*

42. The person only feels happy and fulfilled when engaged in thrill seeking. He is generally an "action junkie" and may also develop addictive disorders. *Id.*

43. The person is angry, suspicious and hostile. He has an explosive rage and often feels exploited or persecuted by the government. He is overly suspicious of authority and power and may maintain a hyperalertness similar to that he used in Vietnam. *Id.*

44. The person feels like a "walking shell" of his former self. His basic capacity for hope is extremely diminished and he may experience catastrophic anxiety or manifest a blank, "zombie-like" stare. *Id.*

45. With this syndrome the person becomes cynical about "the system" in general (i.e. the law, the government and authority figures). Although the person is generally moral and ethical, he tends to seek an anti-system perspective in his moral reasoning. *Id.*

46. Despite this person's strong need for intimacy, he has strained interpersonal relations due to a fear of loss of love objects. He may react to fear or stress by either flight or explosive fits. *Id.*

47. This person already had an underlying psychiatric disorder which has fused with the PTSD. This may cause a paranoid state which can become predominant and mask the PTSD or it may manifest itself in typical hysterical symptoms such as fugue (dissociative) states or amnesia. *Id.*

48. This is the healthiest reaction to PTSD. The person transforms his survivor guilt and other symptoms into an altruistic and nurturing orientation. *Id.* at 73.

49. It appears that the level of combat is the critical variable in the development of PTSD. The more combat the veteran experienced, the higher the chances of developing PTSD. Frye & Stockton, *Discriminant Analysis of Posttraumatic Stress Disorder Among a Group of Vietnam Veterans*, 139 AM. J. PSYCHIATRY 52, 52 (1982); Wilson & Zigelbaum, *supra* note 17, at 70. Others believe it is not the exposure to combat itself, but rather the individual's subjective perception of combat which is determinative. Three factors have been identified: the individual's perception of realistic dangers or fears; the subjective distortion of those dangers or anxieties; and threats to the protective mechanisms used to cope with real or perceived dangers. Hendin, Pollinger, Singer & Ulman, *Meanings of Combat and the Development of Posttraumatic Stress Disorder*, 138 AM. J. PSYCHIATRY 1490, 1490 [hereinafter cited as Hendin].

Other factors have been determined to be relevant to the development of PTSD. One is

whether or not he is likely to engage in criminal behavior.⁵⁰ Wilson and Zigelbaum hypothesize that PTSD is linked to criminal behavior through the "survivor mode" of psychological functioning.⁵¹ The survivor mode is characterized by an altered state of consciousness, hyperalertness, hypervigilance and the use of survivor skills learned in combat in Vietnam.⁵² This internal reaction may be manifested as a dissociative reaction, a Sensation Seeking Syndrome or a Depression-Suicide Syndrome.⁵³ The dissociative reaction is often associated with violent crimes and assaultive behavior.⁵⁴ The Sensation Seeking Syndrome is more likely to be associated with non-violent crimes,⁵⁵ and the Depression-Suicide Syndrome is likely to lead to poorly planned and poorly executed crimes.⁵⁶

the helpfulness of the veteran's family upon his return. The more the veteran was able to share his experiences, the less likely he was to develop PTSD. Frye & Stockton, *supra*, at 55. See also Wilson & Zigelbaum, *supra* note 17, at 70. Another factor is whether the veteran was discharged immediately upon completing his service in Vietnam or whether he had some period of transition before his return home. A transition period was found to be very helpful in helping the veteran cope and, therefore, lessened his chances of developing PTSD. Frye & Stockton, *supra*, at 55; Wilson & Zigelbaum, *supra* note 17, at 70. A third factor is the amount of exposure to the specific stressors, injury, death and destruction in Vietnam. Again, the higher the exposure, the greater the chance of developing PTSD. Wilson & Zigelbaum, *supra* note 17, at 70-71. Fourth, the veteran's own personal locus of control has been found to be relevant. Those whose locus of control was external rather than internal had higher incidents of PTSD. Frye & Stockton, *supra*, at 56.

50. Wilson & Zigelbaum, *supra* note 17, at 73-75. See *infra* text accompanying notes 51-59.

51. Wilson & Zigelbaum, *supra* note 17, at 80.

52. *Id.* at 73.

53. *Id.* at 73-75.

54. *Id.* at 73. If an individual is placed in a threatening situation, he is likely to experience a dissociative reaction in which he may behave as he did in combat in Vietnam. *Id.*

55. *Id.* at 74. In this situation the veteran is compulsively repeating life or death encounters. *United States v. Tindall*, Cr. No. 79-376 (D. Mass. Sept. 19, 1980), involved a defendant who exhibited this type of behavior. Tindall successfully raised a defense of PTSD to drug smuggling charges based on the theory that he was re-enacting combat missions. For a discussion of this and other cases in which defendants successfully raised PTSD as a defense, see Erlinder, *supra* note 7; Note, *Post-Traumatic Stress Disorder—Opening Pandora's Box?*, 17 NEW ENG. L. REV. 91 (1981).

However, a possible exception to the nonviolent theory is the case of Richard Ford, an ex-Los Angeles police officer presently awaiting trial on charges of murder for hire, attempted murder, conspiracy and armed robbery. Prior to his arrest, Ford was seeking treatment for PTSD through the Veterans Administration. Ford has been quoted by others who were in treatment with him as describing his life with the police department as "the same kind of excitement that 'Nam brought on, the rush, you know . . . your life is on the line." L.A. Times, Sept. 26, 1983, § IV, at 1. Certainly Ford appears to fit Wilson and Zigelbaum's description of a "thrill seeker." See *supra* note 42. Yet he stands charged, not with a nonviolent crime such as Tindall's, but with the most violent of all—murder.

56. Wilson & Zigelbaum, *supra* note 17, at 75. The authors theorize three possible motivations behind this behavior: first, an attempt on the part of the veteran to get killed or attack and vent rage at the perceived source of his anguish; second, a means of getting caught and

The Wilson and Zigelbaum study examined the relationship between exposure to specific stressors in Vietnam and particular types of criminal behavior. Significant correlations were found between: (1) the number of weeks in combat and manslaughter; (2) the number of combat roles the veteran performed and disorderly conduct, assault and weapons charges; (3) subjective stress in combat roles and driving under the influence, disorderly conduct, assault and weapons charges; and (4) exposure to stressors indigenous to combat in Vietnam and disorderly conduct, assault, weapons charges, and breaking and entering.⁵⁷ However, no correlation was found between specific combat roles, pre-morbid personality disorders⁵⁸ or the veterans' homecoming experiences and criminal behavior.⁵⁹

Additionally, the seven types of stress responses—depression, physical symptoms, sensation seeking, anger/rage, intrusive imagery, alienation and intimacy conflict—were correlated with criminal conduct.⁶⁰ Assault was significantly correlated with physical symptoms, alienation, anger/rage, intrusive imagery and intimacy conflict.⁶¹ Correlations were also found between weapons charges, physical symptoms and intimacy conflict.⁶²

Finally, the study examined which PTSD factors are predictors of specific criminal behavior. Depression, intimacy conflict and alienation/stigmatization are predictive of disorderly conduct; intrusive imagery is predictive of driving under the influence; and intimacy conflict and depression are predictive of assault.⁶³

Wilson and Zigelbaum concluded that there is a significant relationship between the amount of combat and its stressfulness to the veteran, and criminal conduct characterized by hostility towards others.⁶⁴ They hypothesize, therefore, that the criminal conduct is a form of "acting

thereby receiving help; and third, an unconscious re-enactment of the original trauma. The authors note that this third possibility is also seen in victims of the Nazi persecution. *Id.*

57. *Id.* at 78.

58. The pre-morbid personality is the personality which a mentally ill person had prior to the actual mental illness. A pre-morbid personality disorder, thus, is any signs or symptoms, not rising to the level of an actual illness or disorder, which the person exhibited prior to the point when the illness or disorder was diagnosable as such.

59. Wilson & Zigelbaum, *supra* note 17, at 78-79. It seems then that the factors which contribute to the development of PTSD do not *necessarily* also contribute to criminal behavior, as some factors which correlate to PTSD do not correlate to specific criminal conduct. *See supra* notes 49-50 and accompanying text.

60. *Id.* at 79 (Table 3), 80. *See supra* notes 40-48 and accompanying text.

61. Wilson & Zigelbaum, *supra* note 17, at 80.

62. *Id.*

63. *Id.* at 79 (Table 3).

64. *Id.* at 81.

out" either emotional problems or some aspect of the original trauma.⁶⁵

However, as interesting as these findings may be, they are the results of one limited study which used only 114 veterans. Of the veterans studied, only twenty-four were convicted of driving under the influence, twenty-two of disorderly conduct, eleven of assault, twelve of weapons charges, nineteen of breaking and entering, fourteen of theft and fifteen of drug charges. Additionally, the study does not indicate how many of the 114 veterans were convicted of more than one crime nor which crimes constitute the overlap.⁶⁶ It is interesting to note that no significant correlations were found between specific stressors or specific PTSD factors and theft or drug charges,⁶⁷ and only one significant correlation was found between breaking and entering and a specific stressor.⁶⁸ However, the correlations which were found were to more violent crimes, which may be significant in itself.

IV. EXISTING LAW AND PTSD

There are currently three primary uses for PTSD in the context of criminal proceedings. It may be the basis for a defense, grounds for a new trial or a mitigating factor in sentencing.

A. PTSD as a Defense

PTSD may be used either as an insanity defense or as a related defense, such as diminished capacity or unconsciousness. There are currently two major tests in use in the United States for determining whether a defendant is not guilty by reason of insanity.⁶⁹ The strictest is the "right-wrong" test of *M'Naghten's Case*.⁷⁰ Under *M'Naghten*, a de-

65. *Id.*

66. The breakdown of specific crimes in which Wilson and Zigelbaum found correlations totals 127. The initial breakdown of convictions, which includes crimes in which no correlations were found, indicates a total of 111 veterans. *Id.* at 78. Thus, there is an obvious overlap of 16 convictions. However, the study does not address any correlations between multiple crimes and PTSD factors which were found to be significant.

67. *Id.* at 79.

68. *Id.*

69. A third, the *Durham* test, also known as the "product test," was adopted in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), and excuses conduct which is the "product of mental disease." *Id.* at 876. Most states found this test to be unworkable and it has been abandoned by all jurisdictions except New Hampshire. Note, *The Proposed Federal Insanity Defense: Should the Quality of Mercy Suffer for the Sake of Safety?*, 22 AM. CRIM. L. REV. 49, 54 (1984).

70. See *supra* note 2. Twenty states currently follow the *M'Naghten* test: California, Colorado, Delaware, Louisiana, Minnesota and South Dakota have adopted it by statute; Arizona, Florida, Iowa, Kansas, Mississippi, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Washington and Wisconsin have adopted it

defendant pleading insanity based on PTSD would have to show either that he did not understand his actions were wrong or that he did not understand the nature and quality of his act.⁷¹ If the defendant were suffering from a very severe case of PTSD which included dissociative states or flashbacks, he might be able to plead insanity in a *M'Naghten* jurisdiction. If his crime were one of violence, such as murder or assault, and he indeed believed that he was in combat in Vietnam, then it could reasonably be concluded that he did not know his actions were wrong as he believed he was attacking or killing the enemy.⁷² If, however, he suffered only from the myriad of other symptoms, such as impulsive and aggressive behavior or psychic numbing (any or all of which might lead to acts of violence and be totally beyond his control), the *M'Naghten* test would provide him no defense.

The second test for insanity,⁷³ the American Law Institute (ALI) test,⁷⁴ probably provides a defense for at least a few more sufferers of PTSD. Because the ALI test includes a volitional prong, the veteran who is unable to control his actions as a result of PTSD would be able to assert an insanity defense, even though he knows what he is doing and that it is wrong. Thus, the veteran whose symptoms of impulsive/aggressive behavior or psychic numbing lead to criminal conduct would be in a better position to raise an insanity defense in an ALI jurisdiction.

Another defense based on mental condition, diminished capacity,⁷⁵ is not actually an insanity defense. This defense alleges that the defendant did not have the capacity to form the intent necessary to be guilty of

through case law. Note, *supra* note 69, 52-53 n.24; *People v. Skinner*, 39 Cal. 3d 765, 704 P.2d 752, 217 Cal. Rptr. 685 (1985).

71. *People v. Horn*, 158 Cal. App. 3d 1014, 1021, 205 Cal. Rptr. 119, 123 (1984).

72. It is debatable whether it could be said under these circumstances that the veteran did not know the nature and quality of his act. Certainly, if he believed he were killing the enemy, then he knew that what he was doing was killing a human being.

73. The ALI and the Irresistible Impulse tests will be treated as one test for purposes of this Comment, as those states which use the Irresistible Impulse test do so in conjunction with the *M'Naghten* test, which produces essentially the same result. Note, *supra* note 69, at 53. *M'Naghten* is a cognitive test, while the Irresistible Impulse test is volitional. The ALI test includes both a cognitive prong and a volitional prong. See *supra* note 4 for text of ALI test.

74. See *supra* note 4. Six states have added the Irresistible Impulse test: Georgia has added it by statute, while Alabama, Michigan, New Mexico, Virginia and Wyoming have adopted it through case law. Twenty-one states have adopted some form of the ALI test. Fourteen states have codified some form of it: Alaska, Arkansas, Connecticut, Hawaii, Illinois, Maine, Maryland, Missouri, New York, Oregon, Texas, Utah, Vermont and Wisconsin. Interestingly, Wisconsin offers its defendants a choice of tests. Seven states have adopted it through case law: Indiana, Kentucky, Massachusetts, Ohio, Rhode Island, Tennessee and West Virginia. Additionally, all of the federal circuits, except the First Circuit, have adopted some form of the ALI test. Note, *supra* note 69, at 53 & n.27.

75. See *supra* notes 5-6 and accompanying text.

a specific intent crime.⁷⁶ However, unlike an insanity defense, a finding of diminished capacity does not necessarily negate criminal liability. If the charge encompasses lesser included offenses, the defendant may still be found guilty of a crime.⁷⁷ This defense may well encompass more aspects of PTSD than any other. Under a defense of diminished capacity a defendant could argue that any of the symptoms of PTSD affected his behavior. For instance, the psychic numbing, or change in values, which might also induce criminal behavior, could be used to show that the defendant's behavior truly was affected by a mental disorder.

A defense which is somewhat related to diminished capacity is that of unconsciousness.⁷⁸ Under this defense, the defendant alleges that he was not conscious of his actions. In the case of a defense of unconsciousness based on PTSD, the assertion is essentially that the unawareness was caused by the defendant's mental condition. This is a particularly inviting defense for PTSD defendants because it is not an insanity defense and, if successful, it results in complete acquittal.⁷⁹ Thus, the defendant avoids both the stigma of an insanity defense and confinement in a mental institution.⁸⁰ However, not all PTSD defendants are in a position to assert this defense. In order for the defendant to have been legally unconscious in a PTSD context, he would have to have been in a fugue or dissociative state.

Additionally, it is unclear whether this use of the unconsciousness defense would be accepted in a state which does not allow diminished

76. A specific intent crime includes in its definition some intent on the part of the defendant which must be proven in order for the defendant to be found guilty; e.g., the common law crime of larceny requires the intent to steal. If the defendant only intended to borrow the item he is charged with stealing, he is not guilty of larceny, even though he was fully aware that the item was not his and he intended to take it. R. PERKINS & R. BOYCE, CRIMINAL LAW AND PROCEDURE 417-18 (5th ed. 1977).

77. Many specific intent crimes have lesser included offenses which require only "general criminal intent." General intent is the intent to do the act which the law declares to be a crime. It does not matter whether the person intended to commit a crime. *People v. Zerillo*, 36 Cal. 2d 222, 232, 223 P.2d 223, 230 (1950).

78. See *supra* notes 7-8 and accompanying text.

79. The Model Penal Code states that a person is not guilty of a crime unless the act was voluntary. An act which is done without the actor's conscious knowledge is not voluntary. MODEL PENAL CODE § 2.01; see *supra* note 7. California Penal Code § 26 states in relevant part: "All persons are capable of committing crimes except those belonging to the following classes: . . . Four—Persons who committed the act charged without being conscious thereof." CAL. PENAL CODE § 26 (West 1970 & Supp. 1985). Thus, like insanity, this defense completely exculpates the defendant. It is not that his responsibility is lessened, but rather that he never committed a crime at all.

80. Although it is true that the defendant will not be confined to a mental institution if his defense of unconsciousness is successful, it is also unfortunately true that the court will not be able to insure that the veteran will receive any treatment at all.

capacity. In *People v. Lisnow*,⁸¹ the Appellate Department of the Los Angeles Superior Court rejected the prosecution's argument that a defense of unconsciousness could not be based on a mental condition, reasoning that the difference between unconsciousness and diminished capacity was merely one of degree.⁸² The court stated that, while diminished capacity negates specific intent, unconsciousness negates the capacity to commit any crime at all.⁸³ Thus, before a defense of unconsciousness based upon PTSD can be raised, it appears that the jurisdiction must first accept some theory of diminished responsibility based upon a mental condition short of insanity.⁸⁴

B. PTSD as Grounds for a New Trial

A second possible use of PTSD by the criminal defendant is as grounds for a new trial. If the defendant were convicted prior to his condition being diagnosed as PTSD, he may be able to argue that the recent diagnosis of his condition as PTSD constitutes new evidence. Of course, a motion for a new trial based on new evidence has certain requirements. The new evidence must go to the defendant's guilt or innocence and the evidence must be genuinely new.⁸⁵ It is the requirement that the evidence be "new" that causes the most difficulty in PTSD

81. 88 Cal. App. 3d Supp. 21, 151 Cal. Rptr. 621 (1978). Lisnow raised a defense of unconsciousness based on PTSD to a charge of battery. He asserted that his criminal conduct occurred while he was in "a fugue (or dissociative) state brought on by the continuing traumatic neurosis from which [he] suffered due, in large part, to his combat experience [in Vietnam]." *Id.* at 23, 151 Cal. Rptr. at 622. Lisnow is interesting in that the defendant successfully asserted a PTSD defense before PTSD was recognized as a disorder. See *supra* note 14.

82. Lisnow was decided prior to Proposition 8, which abolished the defense of diminished capacity in California. See *supra* note 6.

83. Lisnow, 88 Cal. App. 3d Supp. at 26, 151 Cal. Rptr. at 624. See *supra* note 79 and accompanying text.

84. A state that does not allow a diminished capacity defense may also prohibit any type of mental incapacity defense short of insanity. For example, California Penal Code § 25(a) states in pertinent part:

In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.

CAL. PENAL CODE § 25(a) (West Supp. 1985).

85. Under Rule 33 of the Federal Rules of Criminal Procedure, a motion for a new trial based on newly discovered evidence will not ordinarily be granted unless the defendant can show that the evidence was unknown or unavailable at the time of trial, that the failure to learn of the evidence was not due to a lack of diligence, that the evidence is material and that the new evidence will probably result in acquittal upon retrial. *United States v. Slutsky*, 514 F.2d 1222, 1225 (2d Cir. 1975) (citing FED. R. CRIM. P. 33).

cases.⁸⁶ If, at the time of trial, the defendant knew that he had a problem at the time he committed the offense, even though he did not realize it was PTSD, the evidence is technically not "new."⁸⁷ Additionally, the requirement that the evidence go to the defendant's guilt or innocence means that the PTSD must be sufficiently severe to be used as a defense. Thus, once again the defendant's success in asserting PTSD will depend upon the jurisdiction.

C. PTSD as a Mitigating Factor in Sentencing

PTSD may also be taken into consideration as a mitigating factor in sentencing. This means that the court may reduce the sentence, place the defendant on probation or impose an alternative sentence. Thus, even if the defendant's condition does not constitute legal insanity, the court is not totally prohibited from considering the effect of the defendant's mental condition.⁸⁸ The problem in this area is the limited ability of the court to do anything other than reduce the defendant's sentence. A court could order the defendant to receive treatment as a condition of probation,⁸⁹ but if the defendant is sentenced to time in prison, the court is no longer in a position to order treatment. Once in the prison system, the veteran suffering from PTSD is left with the same possibilities for treatment, or lack thereof, as any other prisoner with a mental condition.⁹⁰

86. See *infra* text accompanying notes 155-56.

87. See *infra* text accompanying notes 164 & 181-84.

88. Even states which follow strict standards for insanity or other defenses allow evidence of a mental condition for purposes of sentencing. For example, California Penal Code § 25(c) provides that evidence of diminished capacity or of a mental disorder may be considered by the court only at the time of sentencing or other disposition or commitment. CAL. PENAL CODE § 25(c) (West Supp. 1985).

89. 18 U.S.C. § 3651 (1982). Section 3651 permits the court to impose probation and suspend the sentence in the interest of justice and gives the court authority and discretion to impose terms and conditions of probation:

The court may require a person as conditions of probation to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of probation: *Provided*, That the Attorney General certifies that adequate treatment facilities, personnel, and programs are available.

Id.

90. All jurisdictions provide procedures whereby mentally ill prisoners may receive treatment or be transferred to mental institutions if necessary. See, e.g., 18 U.S.C. § 4241 (1982). Generally, however, there are insufficient treatment facilities available for the number of prisoners who require them. NAT'L MENTAL HEALTH ASS'N, MYTHS & REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE 27 (1983) [hereinafter cited as REPORT].

V. APPLICATION OF EXISTING LAW TO PTSD—THE CASES

An examination of several cases in which the defendant alleged PTSD reveals that PTSD may not be as useful to an accused as has been thought. Judges and juries are not quick to accept the validity of PTSD,⁹¹ courts do not accept PTSD as “new” evidence,⁹² and its value in sentencing appears to depend more upon the crime than the defendant’s condition.⁹³

A. PTSD as a Defense

Juries have had difficulty accepting the credibility of a defendant’s story that he believed he was in Vietnam when he committed the crime⁹⁴ or that he does not recall the circumstances surrounding the crime with which he is charged.⁹⁵ Nor is a defendant’s claim that his criminal actions are not in keeping with his normal behavior and personality often believed.⁹⁶

One case in which the defendant alleged that he was in a dissociative state is *State v. Felde*.⁹⁷ In 1979, Felde escaped from the prison where he was serving a twelve-year prison term for assault and manslaughter.⁹⁸ While an escapee, he was arrested for public intoxication and shot a police officer who was transporting him following the arrest.⁹⁹ At trial, Felde pleaded insanity and introduced evidence that he was suffering from PTSD.¹⁰⁰ The evidence demonstrated that he had been in the midst

91. See generally *infra* text accompanying notes 110-14 & 125-35.

92. See generally *infra* text accompanying notes 164 & 181-84.

93. See generally *infra* text accompanying notes 216-20.

94. See *infra* text accompanying notes 100-03 & 112-14.

95. See *infra* note 99 and accompanying text and text accompanying notes 166-67.

96. See *infra* text accompanying notes 149-52 & 157-60.

97. 422 So. 2d 370 (La. 1982).

98. Evidence was introduced during cross-examination which implied that Felde was in a dissociative state at the time he committed the first homicide for which he was convicted and serving time at the time of his escape. Felde shot a friend in the head and put the victim in a bedroom closet. *Id.* at 381. Felde told his mother to “wipe his tears” and said “‘I think there’s a man in there that was shot in the head. I think I killed him.’” *Id.* at 381 n.11.

99. Felde was arrested as a simple drunk when a taxi driver refused to carry him. Although the police had been told that Felde had a gun, they did not find it when they searched him. While they were transporting him, Felde was discovered leaning forward towards the driver’s seat. The police officer simultaneously hit the brakes and pushed Felde backwards. The gun went off. Felde said that he was trying to shoot himself and did not remember anything after the first shot. Three more shots were fired and the officer staggered out of the car and collapsed dead in a ditch. Felde ran slowly away from the scene but was found nearby, still handcuffed and armed. *Id.* at 375-76. See *infra* text accompanying note 108.

100. The court appointed three psychiatrists to examine Felde after he entered a plea of not guilty by reason of insanity. All three testified that Felde was sane at the time of the shooting.

of a dissociative state and that he believed he had been captured by the North Vietnamese at the time he shot the police officer.¹⁰¹ The jury was so moved by the evidence presented by the defense that it issued a separate statement recognizing the contribution of Vietnam veterans and pledging support and assistance.¹⁰² However, the jury was unable to find Felde legally insane under the rule in *M'Naghten's Case*¹⁰³ and, at Felde's own urging,¹⁰⁴ sentenced him to death.¹⁰⁵ Felde's sentence was affirmed

However, the defense also called three psychiatrists, all of whom testified that Felde suffered from PTSD and was suicidal. *Felde*, 422 So. 2d at 378. Felde also introduced lay testimony concerning the changes in his behavior following his return from Vietnam. The evidence showed that Felde had been a "happy-go-lucky kid" prior to serving in Vietnam, but was moody, irritable, depressed, and suffered from sleeping and alcohol problems after his return. Both Felde's mother and his sister had attempted to get him psychiatric help after he returned from Vietnam. *Id.* at 376-77.

101. *Id.* at 378. One psychologist testified that Felde was trying to kill himself, not the police officer, when the first shot was fired. He testified that Felde told him "I saw flashes, flashes like incoming rounds hits, like firecrackers, hearing machine guns, I heard machine guns, I heard rifle fire, I heard more explosions and I couldn't move. I was happy because I knew I was going to die." *Id.*

102. The statement read:

"We, the Jury, recognize the contribution of our Viet Nam veterans and those who lost their lives in Viet Nam.

"We feel that the trial of Wayne Felde has brought to the forefront those extreme stress disorders prevalent among thousands of our veterans.

"We have attempted, through great emotional and mental strain, to serve and preserve the judicial branch of our government by serving on this Jury.

"This trial forever will remain indelibly imprinted upon our minds, hearts, and consciences.

"Through long and careful deliberation, through exposure to all evidence, we felt that Mr. Felde was aware of right and wrong when Mr. Thomkins' life was taken. However, we pledge ourselves to contribute whatever we can to best meet the needs of our veterans."

Id. at 380 n.9.

103. Louisiana follows a modified version of the *M'Naghten* rule; and, the burden of proof is on the defendant to prove his insanity by a preponderance of the evidence. NAT'L MENTAL HEALTH ASS'N, MYTHS & REALITIES: HEARING TRANSCRIPT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE 43, exhibit 1 (1983) [hereinafter cited as HEARING TRANSCRIPT].

104. At the penalty phase of the trial, both Felde and his counsel urged the jury to impose the death penalty. In response to his counsel's questions regarding his ability to control his conduct in the future, Felde testified:

I think other deaths will result. . . . [T]hat's why I suggested it [the death penalty], to prevent it from happening. They would be on your conscience if you can't return it. Now I'm not trying to put you all in a bad position but you all are taking other people's lives in your hands, along with mine, so I think you should return it.

Felde, 422 So. 2d at 394. In closing argument, Felde, acting as his own co-counsel, stated: "A walking time bomb, that's what it is. Somebody else will die as a result of it if I'm not put to death, I am sure. It's happened twice in eight years. . . . I think as countrymen, you owe me that much. I did my part. Please do yours. Okay?" *Felde*, 422 So. 2d at 394.

105. *Id.* at 375. Pursuant to Louisiana statute, the jury found the fact that the victim was a peace officer engaged in his lawful duties to be an aggravating circumstance. *Id.* (citing LA. CODE OF CRIM. PROC. ANN. art. 905.4(b) (West 1984)).

by the Louisiana Supreme Court.¹⁰⁶

It appears that neither the trial court nor the Louisiana Supreme Court disbelieved the existence of PTSD or that Felde suffered from it. Indeed, the Louisiana Supreme Court noted that the evidence of PTSD was "very persuasive."¹⁰⁷ Rather, Felde's PTSD was insufficient to meet the legal test of insanity. Felde himself testified that the dissociative reaction did not begin until after he had pulled the gun on the police officer and the first shot, which was accidental, was fired.¹⁰⁸ Thus, it appears the jury was left with a dilemma: If Felde was sane when he first pulled a gun on the officer, would his subsequent dissociative state during the events which followed excuse the killing? The jury said no, and the supreme court held that a rational juror could have found that Felde was not insane and that Felde had the specific intent to kill or harm the officer.¹⁰⁹

A prime example of reluctance to recognize the validity of PTSD is illustrated by the case of *Miller v. State*.¹¹⁰ In *Miller*, the defendant escaped from a work farm facility in South Dakota after learning that he was to be transferred back to the prison where he had been previously assaulted and injured.¹¹¹ Miller was found four days later in Wisconsin.

At trial he testified that from the time of his escape until he was back in custody, he believed he was in Vietnam and that everywhere he looked he saw Vietnamese people. His only intention in running was to "[g]et back to the States." Miller recalled hiding in a "Buddha shrine" for several days, running across a "rice patty field" and being shot at. Then, suddenly, he was talking to two police officers in Wisconsin.¹¹²

Although Miller testified to all this and had entered a formal plea of insanity which was never withdrawn, his own counsel refused to actively pursue the defense and the trial court failed to instruct the jury on the mental illness defense.¹¹³ Miller was convicted and the South Dakota Supreme Court affirmed.¹¹⁴

106. *Felde*, 422 So. 2d at 398.

107. *Id.* at 380.

108. *Id.* at 390.

109. *Id.* at 393. For further information concerning this case, see Magee, *Viet-Vet Syndrome: The Long War of Wayne Felde*, NATION, Jan. 2-9, 1982, at 11.

110. 338 N.W.2d 673 (S.D. 1983).

111. *Id.* at 674; *Miller v. State*, 313 N.W.2d 460, 461 (1981). Miller was serving a 25 year sentence for second-degree rape and assault with a dangerous weapon for the rape and beating of a Rapid City, South Dakota woman. *Miller v. State*, 344 N.W.2d 78, 79 (S.D. 1984).

112. *Miller*, 338 N.W.2d at 680 (Henderson, J., dissenting). In reality Miller had been hiding in the Cathedral Church in Sioux Falls, South Dakota. *Id.*

113. *Id.* at 676-78. See *infra* note 117 and accompanying text.

114. *Miller*, 338 N.W.2d at 678.

Miller appealed on several grounds, two of which are relevant here: first, that he was denied effective assistance of counsel by his attorney's failure to actively pursue his insanity plea;¹¹⁵ and second, that he was denied both a fair and impartial jury trial and due process of law by the trial court's failure to read his plea of not guilty by reason of insanity to the jury.¹¹⁶

The South Dakota Supreme Court held that although Miller had formally entered a plea of not guilty by reason of insanity, he had "abandoned" the insanity defense prior to trial and, therefore, the trial court had not erred.¹¹⁷ The court also found that the failure of counsel to pursue an insanity defense based on PTSD did not constitute a denial of effective assistance of counsel in that "a lawyer is not required to . . . pursue novel theories of defense"¹¹⁸ and that, "[w]hile mental illness is an established defense, clearly this 'Vietnam Stress Syndrome' is a novel theory of defense."¹¹⁹

The South Dakota Supreme Court merely echoed the sentiments of the post-conviction hearing judge in this case. The post-conviction judge refused to recognize Vietnam Stress Syndrome as a mental illness factor.¹²⁰

In a dissenting opinion, Justice Henderson took exception to both

115. *Id.* at 677. Miller's lack of success on appeal as to this issue was partially due to the fact that he had himself appointed as co-counsel at trial despite the trial court's warnings regarding the dangers of taking that action. *Id.* at 676 & n.2.

116. *Id.* at 675. This action was for post-conviction relief; Miller did not raise the issue of his insanity defense having been ignored on direct appeal. In his initial appeal, Miller alleged that his escape was justified because he feared he would be attacked again by the other prisoners. *Miller v. State*, 313 N.W.2d 460, 461 (S.D. 1981). His failure to raise the PTSD issue initially may have hurt his claim. The court noted in his initial appeal, that even though he testified at trial regarding his flashback to Vietnam, his claim on appeal was that his escape was justified. *Id.* Thus, by the time Miller finally did raise the issue of the trial court ignoring his PTSD defense, the South Dakota Supreme Court had previously heard him argue that he escaped because he was in fear for his life from the other inmates. This, however, should not have affected the court's decision; alternate theories are always acceptable on appeal. 9 J. MOORE, B. WARD, & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 228.02 (2d ed. 1985) (All issues must be raised and briefed in order for court to consider them).

117. 338 N.W.2d at 676. The court did not believe that the heart of Miller's defense was insanity, but rather, justification, as much of the testimony supported a justification theory. There was evidence that Miller's attorney decided not to pursue the insanity defense after he received the psychiatrist's report. However, there was also evidence that the attorney did not seek another opinion nor attempt to obtain Miller's records or Veterans Administration records. *Id.* at 677-78.

118. *Id.* at 678 (quoting *United States v. Baynes*, 687 F.2d 659 (3d Cir. 1982)).

119. *Id.*

120. *Id.* at 682 (Henderson, J., dissenting). The post-conviction judge's Conclusion of Law Number 5 stated: "The entire record as presented to this court fails to present a sufficient evidentiary basis to support a mental illness defense." *Id.*

the hearing judge's and the majority's attitude toward the use of PTSD as a defense, stating: "I cannot countenance the courts of this state refusing to recognize the Vietnam stress syndrome as a mental illness. . . . It appears that the reviewing judge's mind was closed to the very defense that permeated the trial."¹²¹ He concluded that as the defendant had presented much evidence concerning his disorder, the court's refusal to give appropriate jury instructions did indeed deprive Miller of a fair trial.¹²²

Although his trial was held in 1980, and as the Supreme Court of South Dakota pointed out, PTSD was a "novel theory of defense" at that time,¹²³ it was not as "novel" when the appeal was heard in 1983, three years after the American Psychiatric Association formally recognized the disorder.¹²⁴ The Supreme Court of South Dakota appears to believe that a man's guilt or innocence can be determined by the timing of his trial.

The defendant in *United States v. Crosby*¹²⁵ encountered a different problem in attempting to introduce his evidence of PTSD at trial. Crosby was convicted of kidnapping and assault with a deadly weapon after he entered a Veterans Administration hospital with a shotgun and took four people hostage.¹²⁶ Crosby had been undergoing treatment for PTSD for some time and at trial he claimed that he had been in a "disso-ciative" state at the time of the incident.¹²⁷

Crosby sought to have his counselor from the Veterans Outreach

121. *Id.* (Henderson, J., dissenting).

122. *Id.* at 683 (Henderson, J., dissenting).

123. *Id.* at 678.

124. *See supra* note 14 and accompanying text.

125. 713 F.2d 1066 (5th Cir. 1983).

126. *Id.* at 1069-70. Crosby was charged with one count of kidnapping in violation of 18 U.S.C. § 1201(a)(2) and four counts of assault with intent to commit a felony in violation of 18 U.S.C. § 113(b). *Id.* at 1069 (citing 18 U.S.C. §§ 113(b), 1201(a)(2) (1978)).

127. *Id.* at 1069-70. The government's expert testified that Crosby's problems were the result of an "anti-social" personality" and drug abuse, and "that he detected nothing in his examination to indicate that Crosby was suffering from PTSD." *Id.* It is interesting to note that anti-social behavior is a symptom of PTSD. DSM III, *supra* note 14, at 238. *See infra* note 227 and accompanying text.

Crosby introduced much evidence that he was suffering from PTSD. Crosby's wife, mother, brother and friends testified to the changes in his behavior following his return from Vietnam. Two counselors from the Veterans Outreach Center testified as lay witnesses and several psychiatrists also testified. *Id.* at 1072, 1077. Many of the witnesses testified to things they had read in a journal kept by Crosby, which contained accounts of nightmares and flash-backs from as early as 1971. *Id.* at 1072. Despite the quantity of evidence relating to PTSD generally, it appears that Crosby introduced very little evidence specifically concerning the dissociative state. He testified that he had become disoriented and depressed the day before the hostage incident after he read a newspaper account of a Vietnam veteran who had committed suicide. He recalled drinking and taking drugs with a friend, and not sleeping all night, but did not recall how he got home that evening. *Id.* at 1076.

Center, a storefront counseling service under the auspices of the Veterans Administration, qualified as an expert on PTSD. The trial court refused to qualify the counselor but did, however, permit him to testify to his observations as a lay witness.¹²⁸

On appeal, Crosby objected to the trial court's failure to qualify his counselor as an expert when it had qualified a doctor of osteopathy who had no board certification in psychiatry. The Fifth Circuit upheld the trial court's decision that only a physician could qualify as a diagnostic expert of PTSD.¹²⁹ The court also noted that the defendant had four psychiatrists testify as experts and that the counselors from the Outreach Center were permitted to refresh their memories from the counseling center records.¹³⁰ No reason was given for qualifying the doctor of osteopathy.¹³¹

It is not clear, however, that the court's failure to qualify the Outreach Center counselors as experts was prejudicial in this case. Other evidence introduced at trial indicated that Crosby's actions were well planned. This evidence showed that on the morning of the incident he drove to a friend's house and borrowed the shotgun. He then drove to the hospital, parked in the back and left the shotgun in the car. He walked around the building to the main entrance, through the main lobby, past the nurse's station, and exited the building by the ambulance parking area where he had left his car. Moments later he reentered the building with the shotgun.¹³² Although Crosby introduced much evidence that he did indeed suffer from PTSD, very little evidence was offered to support his claim that he had been in a dissociative state.¹³³ Thus, his defense was rejected and he was convicted.¹³⁴ The Fifth Cir-

128. *Id.* at 1077 n.11. A lay witness may not testify to his opinions except as to those which are rationally based on his perceptions (i.e., the speed a car was traveling) or those which are necessary and helpful to a clear understanding of his testimony. FED. R. EVID. 701.

129. *Crosby*, 713 F.2d at 1077. The court noted that the inherent difficulty in accurately diagnosing PTSD and the availability of psychiatric testimony justified the trial court's refusal to qualify the Veterans Outreach Center counselor as an expert. *Id.* See *supra* notes 25-26 and accompanying text.

130. *Crosby*, 713 F.2d at 1077, 1073. On appeal, the defendant also objected to the exclusion of the counselling center records. The Fifth Circuit upheld their exclusion on the grounds that they were essentially cumulative of other testimony and that their exclusion did not prejudice the defendant. *Id.* at 1072-73.

131. *Id.* at 1076-77.

132. *Id.* at 1069. The prosecution also offered evidence, which was refuted, that Crosby had told a friend "I am going to blow some people's heads off at the Veterans Administration Hospital." *Id.* at 1074-75.

133. See *supra* note 127.

134. *Crosby*, 713 F.2d at 1070. Crosby was sentenced to 10 years for kidnapping, to three concurrent five year terms on three of the assault charges and to one five year sentence on the

cuit affirmed.¹³⁵

In contrast to Crosby, the defendant in *State v. Sharp*¹³⁶ did not encounter great obstacles in presenting an insanity defense based on PTSD. He did, however, fail to prove that he was legally insane at the time.¹³⁷ Sharp was convicted and sentenced to life in prison for the murders of his aunt and uncle.¹³⁸

Sharp had gone to visit his wife, who had moved in with her brother and sister-in-law, Mr. and Mrs. Bobinger (Mrs. Bobinger was also the defendant's aunt), because she was no longer able to live with Sharp and his uncontrollable fits of rage.¹³⁹ While he was visiting, he pulled out a knife and laid it next to him on the sofa. Mr. Bobinger then asked him to leave because Sharp's wife was afraid. Sharp refused and became violent. In the scene that followed he stabbed to death both his aunt and her husband and wounded his nephew.¹⁴⁰

Sharp pleaded not guilty by reason of insanity based upon PTSD. The defense experts categorized the defendant's condition as "an uncontrollable sort of 'rage reaction' " during which he was incapable of knowing right from wrong.¹⁴¹ One psychiatrist testified that Sharp had " 'resorted to survival tactics,' " ¹⁴² and a counselor from the Veterans Administration testified to conversations with Sharp concerning Sharp's battle experiences.¹⁴³ However, the state's expert characterized the defendant as having an " 'explosive personality disorder' " which worsened

fourth assault charge. The five year sentences were suspended on the condition that he be placed on probation following his release after serving the 10 year sentence. *Id.*

135. *Id.* at 1080.

136. 418 So. 2d 1344 (La. 1982).

137. *Id.* at 1347. Louisiana follows the *M'Naghten* test for insanity and places the burden of proof, by a preponderance of the evidence, on the defendant. *Id.* at 1347 n.7; HEARING TRANSCRIPT, *supra* note 103, at 43, exhibit 1.

138. *Sharp*, 418 So. 2d at 1347.

139. *Id.* at 1346. Sharp's wife testified that generally Sharp's behavior was normal, but that after "brooding" he would fly into a rage and beat her. *Id.* at 1347 n.6.

140. *Id.* at 1346. The nephew managed to run out of the house and escape further injury. When the nephew ran, the defendant also fled. The defendant's wife had run to another room and managed to escape injury entirely. *Id.*

141. *Id.* at 1347.

142. *Id.* This theory is not inconsistent with studies concerning the connection between criminal behavior and PTSD. The "survivor mode" is often associated with criminal behavior. See *supra* text accompanying notes 51-56. However, two of the defense experts also testified that Sharp was suffering from paranoid schizophrenia. *Sharp*, 418 So. 2d at 1347.

143. *Id.* at 1347 n.4. The court permitted the counselor to testify as an expert in social work specializing in counseling veterans who suffered from emotional problems. *Id.* But see *United States v. Crosby*, 713 F.2d 1066, 1076 n.10 (1983) (court refused to qualify outreach center counselor as expert in social work on ground that sociology "had no significant relevance to the issues at trial."). See *supra* notes 128-29 and accompanying text.

after his tour in Vietnam.¹⁴⁴ Sharp was convicted of first-degree murder and sentenced to life in prison.¹⁴⁵ The Louisiana Supreme Court affirmed, stating that the evidence was in conflict and a jury could reasonably have returned a verdict of either guilty or not guilty by reason of insanity.¹⁴⁶

The cases of *Crosby* and *Sharp* illustrate quite clearly that PTSD in and of itself is not a defense. It is plain that both defendants had very real symptoms of PTSD.¹⁴⁷ Both Crosby and Sharp had been undergoing treatment.¹⁴⁸ Yet, in the eyes of the law, PTSD is nothing more than a mental condition which may or may not have sufficient legal significance to be of any benefit in a criminal defense.

In some cases, the defendants suddenly and inexplicably embarked on a pattern of behavior which was totally foreign to their usual selves. Yet, the fact that this behavior was so out of keeping with the defendants' backgrounds was of little help in convincing the judges and juries that the defendants had bona fide mental disorders.

One of the more dramatic cases is *State v. Cone*.¹⁴⁹ The defendant in *Cone* had entered college following his service in Vietnam and graduated with honors in three years. He was accepted into law school, having scored in the ninety-sixth percentile on the admissions test. However, after college, Cone was convicted of three separate armed robberies and spent five years in prison. Following his release from prison, he robbed a jewelry store and shot a citizen and a police officer in the chase that followed. The next day, while still trying to evade the police, he beat an elderly couple to death because they "ceased to cooperate with him [in that they] became frightened [which] was not what he wanted them to do."¹⁵⁰ Cone's defense of insanity based on PTSD was rejected¹⁵¹ and he

144. *Id.* at 1347. He testified that the defendant confined his "temper displays" to his wife and family. The state's doctor also testified that Sharp was not schizophrenic and knew the difference between right and wrong at the time of the crime. *Id.*

145. *Id.* at 1345, 1347.

146. *Id.* at 1348-49. The court also noted that "[t]he record left little doubt that this young conscript infantry soldier was indelibly scarred psychologically by his confrontations with death and destruction," but that the question before the jury was whether the "psychological scars" left him unable to distinguish right from wrong 10 years later. *Id.* at 1346.

147. Crosby's nightmares, flashbacks and alienation are all PTSD symptoms, as is Sharp's aggressive, explosive behavior. DSM III, *supra* note 14, at 238; *see supra* text accompanying notes 17-20.

148. *See supra* text accompanying notes 127 & 143.

149. 665 S.W.2d 87 (Tenn. 1984).

150. *Id.* at 91. Cone never denied the killings, but rather denied much recollection of the incident. He claimed he remembered only that he wanted to get cleaned up and fed so he could escape when his victims became frightened. *Id.*

151. It appears that the only evidence offered to support Cone's PTSD claim was his failure

was convicted and sentenced to death.¹⁵²

The court does not appear to have noticed that it is rather unusual for a man who was an honor student and accepted into law school, to suddenly have changed to a life of drugs and crime which culminated in the brutal beating and murder of an elderly couple. Additionally, the court does not appear to have believed either that the defendant used drugs excessively or that he suffered from PTSD.¹⁵³ One cannot help but wonder just what the jury and the court thought prompted the defendant's bizarre change in behavior.¹⁵⁴

B. PTSD as Grounds for a New Trial

Defendants have been surprisingly unsuccessful in using PTSD as grounds for a new trial when they were convicted prior to 1980 or when doctors failed to diagnose PTSD at the time of trial. Even though PTSD was not formally recognized until 1980, the court may not consider evidence of PTSD to be "new" if the defendant was ever treated for a mental problem in the past. This is true even if the disorder was previously misdiagnosed or if the new evidence relates to a different disorder or condition.¹⁵⁵ On the other hand, if the defendant was never treated for a mental disorder in the past and is now diagnosed as suffering from PTSD, he may face a different problem. The court may consider the

to remember and his drug use. Cone's experts testified that Cone was suffering from PTSD and "chronic amphetamine psychosis" as a result of serious drug abuse." *Id.* at 92. However, several lay witnesses testified that he did not appear to be seriously under the influence of drugs or experiencing withdrawal when they saw him in the days prior to the time the crimes were committed. *Id.* One police officer testified that there were no needle marks or other exterior signs of drug abuse on Cone's body. *Id.* at 91. The court placed great emphasis on the lack of objective verification of Cone's drug use and on the fact that he had not been seen by his expert witnesses until a few weeks prior to trial. *Id.* at 90. However, amphetamines can be taken either orally or intravenously and the symptoms of amphetamine intoxication are not the same as other forms of narcotic intoxication such as heroin intoxication. See generally DSM III, *supra* note 14, at 147-50.

152. *Cone*, 665 S.W.2d at 89-90.

153. See *supra* note 151. While PTSD and drug abuse are often found together, drug abuse may mask the PTSD as many of the symptoms are similar. See *supra* note 31 and accompanying text.

154. Apparently the court believed that Cone was a sociopath. This is not an unreasonable belief under the facts of the case, standing alone. But the fact that Cone was once an honor student makes the validity of this conclusion questionable. A person with an antisocial personality disorder, or sociopath, see *infra* note 227, first experiences the disorder before age fifteen. In males, the first symptoms usually appear in early childhood, and interfere with educational achievement. DSM III, *supra* note 14, at 317-21. While it is true that those suffering from PTSD may be misdiagnosed as being sociopaths, it is also true that PTSD may bring about a change of values and anti-social behavior. DSM III, *supra* note 14, at 236-38; see *supra* text accompanying note 19; see *infra* note 227 and accompanying text.

155. See *infra* text accompanying notes 164 & 181-84.

issue of an insanity defense to have been waived if it was not raised at trial.¹⁵⁶ This interesting legal "catch 22" severely limits the use of PTSD as grounds for a new trial.

The case of *United States v. Stone*¹⁵⁷ is similar to *Cone* with respect to the dramatic change in the defendant's behavior. Stone was a highly decorated Vietnam veteran and an airborne instructor in the Army with the rank of sergeant. While serving in Vietnam, he was treated for "combat fatigue" and sent back to the United States where he continued to serve in the Army.¹⁵⁸ In 1971, a year after his return from Vietnam, Stone was convicted of kidnapping, assault with a deadly weapon, assault with intent to commit rape, disabling and maiming, aggravated sodomy and rape¹⁵⁹ for the brutal abduction and rape of a local elementary school teacher.¹⁶⁰

Stone asserted an insanity defense based on "combat fatigue," but was unsuccessful.¹⁶¹ On appeal, the court held that the jury was warranted in finding that Stone did not meet the legal test of insanity, and

156. See *infra* text accompanying note 171.

157. 472 F.2d 909 (5th Cir. 1973), *cert. denied*, 449 U.S. 1020 (1980).

158. Stone served two tours in Vietnam and was wounded both times. Hospitalization was not required either time and both times he was immediately returned to combat duty. In 1970, he was treated for combat fatigue after a battle in which he was the sole survivor. He was evacuated to a hospital following an incident at a field hospital in which he became hysterical and began threatening people with a loaded weapon. At a military hospital in Japan, he was diagnosed as "depressive reaction, chronic." *Stone v. United States*, 4 Cl. Ct. 250, 251 (1984). He was released to return to duty with the restrictions that he be stationed in the United States, that he not be assigned to an isolated area and that he not be reassigned to combat. Following his release, the diagnosis was changed in his records to "[r]eaction, psychoneurotic, dissociative type, acute, severe, manifested by sudden hysterical behavior, a sudden diminution [sic] of contact with reality, sudden threatening of violence which probably was in response to hallucinating that enemy were all about him" *Id.* at 252. His impairment was listed as "[m]ild for further military duty; minimal for social and industrial adaptation." *Id.*

159. As the crimes were committed at Fort Benning, the defendant was charged under 18 U.S.C. § 13 (1982), which provides for the adoption of state law for areas which are under exclusive or concurrent federal jurisdiction. 472 F.2d at 910 & n.1.

160. The victim was married to a lieutenant who was stationed at Fort Benning. Stone initially attacked her in her home but dragged her out of the house to his car after a neighbor, who had heard her scream, came to see if she was all right. He then took her to a deserted road where he repeatedly raped, sodomized, and beat her, and burned her with lighted cigarettes and the car's cigarette lighter. In the morning he released her after telling her that he had recently returned from Vietnam. 472 F.2d at 911-12.

161. It is unclear what Stone relied upon to support his insanity defense; however, members of his family testified to his irrational behavior following his return from Vietnam and several soldiers testified that Stone had behaved irrationally while in Vietnam. *Id.* at 912. There is no indication that Stone claimed to have been in a dissociative state or that he could not recall the attack. Additionally, following his arrest, Stone waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1968), and signed a confession. *Id.*

upheld the conviction.¹⁶² In 1981, Stone requested a new trial based on a recent diagnosis of PTSD but was unsuccessful.¹⁶³ The claims court stated that Stone had been aware of the "new" evidence because his military records established that he had been mentally ill and that his motion amounted to another direct appeal on the matter of his guilt or innocence.¹⁶⁴ Thus, the fact that he had not been diagnosed as suffering from PTSD was irrelevant. The court appears to believe that one mental illness is as good as another in an insanity defense, regardless of the fact that all mental illnesses do not have aspects sufficient to constitute legal insanity.

An interesting sidelight to the *Stone* case is that the Army was sufficiently impressed with him and his service record to grant him an honorable discharge following his conviction.¹⁶⁵

In *State v. Serrato*,¹⁶⁶ the defendant faced the opposite problem when he requested a new trial based on a recent diagnosis of PTSD. His failure to plead insanity initially precluded him from introducing evidence of PTSD under the newly discovered evidence doctrine. The facts of the case, as found by the trial court, are that Serrato was a helicopter pilot who was going on a short trip with his daughter. He decided to return to his house to request that his wife join them, but when he did, she became angry. Serrato's next recollection was of himself sitting on the bed next to her body. He then returned to his car where his daughter was still waiting and resumed his trip.¹⁶⁷ Serrato did not plead insanity at his trial as he had no realization at that time that he was possibly suffering from PTSD.¹⁶⁸ Serrato's questionable confession¹⁶⁹ was intro-

162. *Stone*, 472 F.2d at 913, 917.

163. *Stone v. United States*, 4 Cl. Ct. 250, 257 (1984). Stone filed a motion titled "Motion for New Trial and Complaint for Benefits and Allowances" alleging newly-discovered evidence of PTSD. He also attempted to receive disability retirement pay based on PTSD, and made two attempts to receive back pay for the time he was in prison prior to his discharge, alleging that his absence was unavoidable because it was the result of a service related condition. None of his claims were successful. The Veterans Administration determined that Stone had a personality disorder or nervous condition. *Stone v. United States*, 4 Cl. Ct. 250, 256; see also *Stone v. United States*, 219 Ct. Cl. 604, 618 F.2d 119 (1979); *Stone v. United States*, 4 Cl. Ct. 264 (1984) (action to recover reenlistment bonuses recouped by United States). The motion was denied as being untimely in *Stone v. United States*, Ct. Cl. No. 292-78 (Order, March 12, 1982). The back pay and benefits aspects were denied in *Stone v. United States*, 4 Cl. Ct. 264 (1984).

164. *Stone*, 4 Cl. Ct. 250, 257 (citing *Stone v. United States*, Ct. Cl. No. 292-78 (Order, March 12, 1982)).

165. *Stone*, 4 Cl. Ct. 250, 256 (1984).

166. 424 So. 2d 214 (La. 1982).

167. *Id.* at 216.

168. *Id.* at 222-23. The crime occurred in October of 1980. Serrato was first examined by a psychiatrist in November, 1980 and then again in January, 1981. *Id.* at 216, 223. PTSD was

duced at trial and he was convicted and sentenced to life in prison without benefit of parole, probation or suspension.¹⁷⁰

The trial court had denied Serrato's motion for a new trial on the grounds that: (1) as he had not plead not guilty by reason of insanity initially, the new evidence would not be admissible; (2) the defendant had not been diligent in discovering the new evidence; and (3) it did not appear that the psychiatric testimony would change the verdict.¹⁷¹ In support of this last reason, the court noted that one doctor testified that the defendant did know right from wrong immediately before he killed his wife because he had the presence of mind to go to the kitchen and get the cookie he had promised his daughter and bring it back to the car for her. The court also relied on the testimony of the other doctor that Serrato did not possess all of the symptoms associated with PTSD.¹⁷²

On appeal, Serrato argued that his lack of diligence in discovering the PTSD, and consequent failure to plead insanity initially, was a result

first recognized by the American Psychiatric Association in October, 1980. *See supra* note 14 and accompanying text.

169. Serrato was picked up by the police that afternoon. He waived his rights and was then questioned for approximately four hours before he was formally arrested. Serrato had not confessed at the time he was arrested. He was transferred to the State Police Department the next day and was again interrogated. The state's and Serrato's stories differ at this point, but certain facts are consistent. Serrato fainted sometime during questioning the second day. Additionally, he had requested an attorney. Although one was eventually called from the Indigent Defender Board, the questioning apparently continued prior to the attorney's arrival. When an attorney from the Board did arrive, he was delayed at the station for more than one-half hour before being directed to the detective's annex. At the detective's annex, the detectives claimed that the attorney was drunk and refused to let him see Serrato. The attorney then called his wife, also an attorney, to come down and talk to Serrato. She was permitted to see the defendant but noticed that conversation could be overheard through the walls of the interview room. *Serrato*, 424 So. 2d at 217-19.

The Louisiana Supreme Court found that the trial court's determination that the confession was voluntary was not unsupported by the evidence. *Id.* at 222. Justice Dennis dissented on the issue of the confession, finding it to be the product of Serrato's illegal arrest. *Id.* at 225 (Dennis, J., dissenting).

170. *Id.* at 216.

171. *Id.* at 222.

172. *Id.* at 224. The presence of all possible symptoms is not required for a diagnosis of PTSD. DSM III, *supra* note 14, at 238. Dr. Ritter testified that Serrato did not have any memory impairment or trouble concentrating and that he had not avoided any activities that could cause recollection of the traumatic event or exposure to events that resembled the traumatic event. *Id.* at 224. However, there was evidence that Serrato suffered from constant memories of the war, flashbacks and dreams, exaggerated startle responses, and feelings of alienation from society. *Id.* at 223 n.9. Yet, the court appears to have concluded that as Serrato did not exhibit all the symptoms of PTSD, his evidence was lacking. The court was also quite concerned that there had been no independent verification of Serrato's Vietnam experiences. *Id.* at 224. Yet, this is one of the problems inherent in a diagnosis of PTSD—such verification is not always possible. *See infra* note 227 and accompanying text.

of the disorder itself.¹⁷³ One doctor testified that "one of the classic symptoms of this disorder is the denial of its symptoms."¹⁷⁴ Nevertheless, the Louisiana Supreme Court affirmed Serrato's conviction and the denial of his motion for a new trial,¹⁷⁵ relying upon the trial court's finding that the PTSD evidence would not have changed the verdict.¹⁷⁶

The defendant in *Scarborough v. United States*¹⁷⁷ found himself in a predicament similar to that of both Stone and Serrato. Prior to 1980, Scarborough was sentenced to twenty-five years in prison for assaulting a postal employee.¹⁷⁸ In 1981, he filed a motion to vacate his sentence asserting newly discovered evidence of his insanity based upon a recent diagnosis of PTSD and exposure to Agent Orange.¹⁷⁹ The court denied Scarborough's motion on the grounds that: (1) he had not plead insanity at the time of trial; (2) a competency hearing prior to trial found him mentally competent to stand trial;¹⁸⁰ and (3) he knew of a 1969 medical report which had recommended his discharge from the service due to an anxiety reaction,¹⁸¹ yet he failed to raise the issue at trial.¹⁸² Therefore, the defendant was deemed to have waived an insanity defense.¹⁸³ The court noted that the new evaluation did nothing more than describe the same anxiety reactions as the 1969 report.¹⁸⁴

The *Scarborough* court made the same error as the *Stone* and *Serrato* courts. It did not recognize that a difference in diagnosis based upon

173. *Serrato*, 424 So. 2d at 223.

174. *Id.* DSM III does not include this as a symptom of PTSD. DSM III, *supra* note 14, at 236-38.

175. 424 So. 2d at 225.

176. *Id.* at 223-24. See *supra* notes 171-72 and accompanying text.

177. 683 F.2d 1323 (11th Cir. 1982).

178. *Id.* at 1324. Scarborough pleaded guilty on March 31, 1978. He later attempted to withdraw his guilty plea but was unsuccessful. *Id.* at 1324-25.

179. The motion was filed pursuant to 28 U.S.C. § 2255, which provides that a prisoner in custody may move the court to vacate the judgment through a collateral attack on the sentence imposed, 28 U.S.C. § 2255 (1982), and was styled in the form of a Writ of Error Coram Nobis, a common law writ to correct a judgment on an error of fact when the fact is unknown at the time of judgment and when the fact would have changed the judgment, provided the fact could not have been known by the exercise of reasonable diligence. The basis of the motion was that newly discovered evidence of PTSD showed that the defendant was insane at the time he committed the crime and entered the guilty plea. *Scarborough*, 683 F.2d at 1324.

180. The district court initially ordered that Scarborough be examined by a doctor to determine if he was competent to stand trial. When the doctor's report declared him competent, he pleaded guilty. *Id.* at 1324-25.

181. Scarborough was given a medical discharge from the Army in 1969 as a result of an anxiety reaction to combat. The report suggested that the effects might be permanent. *Id.* at 1325.

182. *Id.*

183. *Id.*

184. *Id.* The exact nature of Scarborough's symptoms is not provided in the opinion.

the same symptoms can mean the difference between legal sanity and legal insanity.¹⁸⁵ The fact that the symptoms are the same or similar is not determinative since each mental illness has factors which are unique.¹⁸⁶ If the new diagnosis presents the possibility that the defendant may have been legally insane, and the diagnosis could not have been made at the time of the original trial or plea, the defendant truly does have new evidence and should be granted a new trial.

C. PTSD as a Mitigating Factor in Sentencing

In a few cases, defendants have successfully argued that their PTSD should be considered in sentencing.¹⁸⁷ In other instances, however, defendants' arguments have been to no avail.¹⁸⁸ In cases where the defendants have been successful, the PTSD does not really appear to be the reason for the reduced sentences. Rather, it seems to be based on the nature of the crime and the defendant's success in rehabilitation.¹⁸⁹

In *State v. Watson*,¹⁹⁰ the defendant was convicted of second-degree murder in the death of his wife and sentenced to life imprisonment.¹⁹¹ He appealed his sentence on the ground that his mental condition had not been considered as a mitigating factor.¹⁹²

Watson murdered his wife when she attempted to move out of their home. He testified that his wife held a gun on him saying, "[y]ou are not going to hit me again." A struggle ensued and Watson gained possession of the gun. The physical evidence showed that he shot his wife repeatedly as she crawled from room to room attempting to escape. When the gun was empty, he reloaded and continued to shoot her.¹⁹³

At trial, Watson introduced evidence that he was suffering from PTSD and that in 1967, following an acute psychotic episode while he

185. See generally Diamond, *The Fallacy of the Impartial Expert*, in *READING IN LAW AND PSYCHIATRY* 217 (rev. ed. 1975); see *infra* note 227 and accompanying text.

186. See generally DSM III, *supra* note 14.

187. See *infra* text accompanying notes 204-07 & 213-15.

188. See *infra* text accompanying notes 196-98.

189. See *infra* text accompanying notes 216-20.

190. 311 N.C. 252, 316 S.E.2d 293 (1984).

191. 316 S.E.2d at 295, 297.

192. He did not appeal the conviction. *Id.* at 295. Watson also argued that the trial judge erred in finding as an aggravating factor that the crime was particularly heinous, atrocious or cruel and that this factor was not established by a preponderance of the evidence. *Id.* Watson further claimed that the mitigating factors outweighed the aggravating factors, and that the judge erred in not finding as a mitigating factor that his wife's leaving him provided strong provocation for his actions. *Id.* at 297.

193. *Id.* at 295. Ten bullets were found in Ann Watson's body and there were blood stains in several rooms of the house. *Id.*

was serving in the Marine Corps, he was diagnosed as suffering from schizophrenia.¹⁹⁴ A forensic psychiatrist testified on Watson's behalf that although Watson had recovered from the acute psychotic episode, his judgment, perceptions, feelings, awareness and possibly his intentions were still affected by a residual reaction or post-traumatic stress disorder.¹⁹⁵ The state's rebuttal expert testified that Watson was not suffering from PTSD and no evidence was introduced that the defendant had been treated for any mental illness following his return from Vietnam.¹⁹⁶

The Supreme Court of North Carolina held that since the evidence of Watson's mental condition was conflicting and inconclusive as to any connection between Watson's mental condition and the murder, the trial court was not required to find that the defendant had proved the existence of a mental condition by a preponderance of the evidence.¹⁹⁷ Thus, the supreme court affirmed the sentence of life imprisonment.¹⁹⁸ It should be noted that the court did not hold that PTSD would not be a mitigating factor, but rather that the defendant's evidence was insufficient to establish that he suffered from PTSD.¹⁹⁹

In contrast to *Watson*, the defendant in *State v. Spawr*²⁰⁰ was far more successful in asserting PTSD as a mitigating factor. Spawr became involved in an argument with another patron in a restaurant; he left the restaurant and went to his car to retrieve his gun.²⁰¹ He then returned to the restaurant and confronted the man again. When the other man grabbed him, a scuffle ensued in which Spawr was shot in the arm and the other man was shot in the chest. Both recovered.²⁰² Immediately after the incident, Spawr sought treatment at the Veterans Administration because he was thoroughly shaken, disturbed and remorseful over

194. *Id.* at 296.

195. *Id.* Watson was treated in 1967, while in the Marines, "because he was preoccupied with a hatred and fear of all 'slant eyed people.'" He also claimed that since returning from Vietnam he had been afraid of shooting, even though he had qualified as a sharpshooter in the Marine Corps. It was Dr. Smith's theory that Watson's dispute with his wife was a reoccurrence of the original trauma. *Id.*

196. *Id.* at 295. Dr. Rollins testified for the prosecution that when he examined Watson, the defendant had told him, "I don't think [combat in Vietnam] affected me that much; I was about the same as before. I got them to pull me out because of my feet." *Id.* at 296. Yet, the fact that Watson had been diagnosed as schizophrenic does raise a question whether it was a misdiagnosis of PTSD. See *supra* notes 24 & 29 and accompanying text.

197. *Id.* at 296.

198. *Id.* at 297.

199. *Id.* at 296.

200. 653 S.W.2d 404 (Tenn. 1983).

201. *Id.* Spawr testified that he had his gun in the car because he had recently been target shooting. *Id.*

202. *Id.* at 404-05.

his conduct. He was diagnosed as suffering from PTSD and began treatment in an "Anger Management Stress Program."²⁰³

Spawr was convicted of attempted assault.²⁰⁴ At his sentencing hearing, he presented much evidence as to his progress in the stress program²⁰⁵ and requested a suspended sentence.²⁰⁶ However, he was sentenced to one year in prison. On appeal, the Tennessee Supreme Court remanded, stating that the defendant should be granted probation if his rehabilitation was determined to be successful.²⁰⁷

The defendant in *United States v. Krutschewski*²⁰⁸ was also far more successful than Watson in using PTSD as a mitigating factor. Krutschewski was convicted of importation and distribution of marijuana and was initially sentenced to ten years and a maximum fine of \$60,000.²⁰⁹ At trial, his defense, which was based on PTSD, was rejected.²¹⁰ Following sentencing, he moved for an alternative sentence of community service and establishment of a charitable trust fund.²¹¹ The court rejected his proposal as not having a strong enough deterrent effect and upheld the sentence.²¹²

203. *Id.* at 405-06. Dr. Jaremko, a consultant to the veteran's center Vietnam rehabilitation program, testified at length as to why there were so many cases of PTSD arising from the Vietnam War as well as to what PTSD is and how it is treated. *Id.* The court included much of this testimony in its opinion, which is some indication that the court was influenced by the fact that the defendant was a Vietnam veteran suffering from PTSD.

204. *Id.* at 404. The defendant was indicted for assault with intent to commit murder but pleaded guilty to an attempt to commit the crime charged. *Id.*

205. Dr. Jaremko testified that the defendant was "'one of the most successful individuals [he'd] ever treated'" and that "'he [had] made remarkable strides in the treatment.'" *Id.* at 406. Several persons connected with the program testified that Spawr had been very faithful in his attendance and was making excellent progress. *Id.*

206. *Id.* at 404. Dr. Jaremko also testified that prison would be detrimental to Spawr in that although he was making good progress in treatment, he still required counseling for one to two more years. The doctor felt that prison would probably deteriorate the values that the counseling program had helped Spawr to reconstruct. *Id.* at 406.

207. *Id.* In remanding, the court noted that Spawr had been out on bond for two years since the incident and that the trial court had failed to consider Spawr's good faith efforts to rehabilitate himself. *Id.*

208. 541 F. Supp. 142 (D. Mass. 1982).

209. *United States v. Krutschewski*, 509 F. Supp. 1186, 1187 (D. Mass. 1981).

210. *Id.* at 1188. No information is given in either case as to the basis for Krutschewski's PTSD defense.

211. *Krutschewski*, 509 F. Supp. at 1187. The defendant had formed a petroleum corporation with the proceeds of his drug smuggling and had successfully invested in oil leases that projected a return of \$1,700,000 over the next four years. *Id.* at 1188-89.

212. *Id.* at 1191. Although the court declared that it would not consider any alternative sentence that would allow Krutschewski to enjoy the proceeds of his illegal activities, it was not entirely adverse to the possibility of an alternative sentence. The court noted that it had received many communications supporting Krutschewski's request for leniency, including a "most astonishing one . . . from the psychiatrist who testified for the government on the 'Viet-

Krutschewski filed a second motion,²¹³ again requesting a reduction of sentence based on his rehabilitation and also requesting that, in the alternative, his sentence be placed under the provisions of 18 U.S.C. section 4205(b)(2), which would permit the parole commission to consider parole at any time.²¹⁴ The court granted the alternative request and placed the defendant's sentence under the provisions of the statute. Although it was unwilling to extend more special consideration to the defendant than it already had by placing him under section 4205(b)(2), the court noted that "[i]t may well be that special consideration should be given to war veterans who have made great sacrifices for their country. . . . [I]t should be a matter of national policy, not randomly case by case."²¹⁵

The difference between Watson's failure and Spawr and Krutschewski's success in using PTSD as a mitigating factor appears to relate more to the nature of the crime itself and the individual defendant's success at rehabilitation than to the court's acceptance of the PTSD defense. Watson killed his wife in a particularly cruel and brutal manner.²¹⁶ Spawr's victim, on the other hand, recovered. In addition, Spawr was extremely shaken over the incident, pleaded guilty and immediately sought counseling.²¹⁷ Watson offered no evidence that he had received any sort of treatment for his mental disorder following his release from the service.²¹⁸ In *Krutschewski*, the defendant had committed a non-violent crime (drug smuggling) and had ceased all smuggling activity five years before his indictment. Additionally, he had become a respected businessman and civic leader.²¹⁹ The *Krutschewski* court noted that although special consideration should perhaps be given to war veterans, it would not do so on an individual case basis.²²⁰ Thus, it appears that a defendant's success or

nam Syndrome' issue." *Id.* at 1188. At Krutschewski's second hearing, an amicus brief was submitted by Vietnam Veterans of America, Inc. *Krutschewski*, 541 F. Supp. at 143.

213. *Krutschewski*, 541 F. Supp. at 142.

214. 18 U.S.C. § 4205(b)(2) states:

(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, . . .

. . . .
(2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

18 U.S.C. § 4205(b)(2) (1982).

215. *Krutschewski*, 541 F. Supp. at 143.

216. *See supra* note 193 and accompanying text.

217. *See supra* text accompanying notes 202-03.

218. *See supra* text accompanying note 196.

219. *Krutschewski*, 509 F. Supp. at 1188. *See supra* note 211 and accompanying text.

220. 541 F. Supp. at 143. *See supra* text accompanying note 215.

failure in obtaining a reduced sentence has very little to do with the issue of PTSD.

A fourth case, which does not fall under either of the extremes of the other three, is *State v. Pettit*.²²¹ In *Pettit*, the defendant pleaded guilty to second-degree murder in the killing of his wife.²²² He was sentenced to an indeterminate term not to exceed twenty years. The defendant appealed, claiming that the sentence was excessive because sufficient rehabilitation programs were not available to him in prison. Pettit had presented evidence at the sentencing hearing that he suffered from alcohol abuse, a passive-aggressive personality and PTSD.²²³

The court stated that in its view, the facts supported a minimum term of confinement of five years and therefore, the indeterminate twenty year sentence was not excessive. The court also noted that the sentencing judge had taken full account of these mitigating factors.²²⁴ The court of appeals of Idaho affirmed, deferring to the trial court's finding that sufficient treatment programs would be available to the defendant.²²⁵ No mention was ever made of precisely what treatment was available.

The trial court in *Pettit*, however, did apparently consider the defendant's mental condition as a mitigating factor. In pointing out that the sentence could very well be viewed as lenient, the appeals court noted that in Idaho, indeterminate *life* sentences have been imposed for second-degree murder and upheld on appeal.²²⁶

221. 104 Idaho 601, 661 P.2d 767 (Idaho App. 1983).

222. *Id.* at 602, 661 P.2d at 768. Pettit and his wife had been having marital problems. A few days before the murder they had a heated argument which culminated in Pettit hitting his wife and damaging numerous household furnishings. On the day of the murder, Pettit became extremely intoxicated and then shot his wife in the head. He called the police and reported the killing himself. *Id.*

223. The psychiatrists who examined Pettit determined that he did not display any mental condition which would preclude responsibility. Evidence was introduced that showed Pettit had a troubled childhood and had been an abused child. The diagnosis of PTSD was not unanimous and no facts concerning the reason for the diagnosis are given in the opinion. *Id.* at 602-03, 661 P.2d at 768-69.

224. *Id.* at 603-04, 661 P.2d at 769. In determining that the sentence was not excessive, the court considered all three purposes of punishment: retribution, deterrence and rehabilitation. The court stated that society has a legitimate interest in retribution for such a tragic and senseless crime and that deterrence alone is a sufficient justification for imposing a prison sentence. Although the court noted that rehabilitation is also a valid purpose, which is sometimes thwarted by imprisonment, and that Pettit's PTSD claim warranted further clinical evaluation, it accepted the trial judge's opinion that sufficient treatment would be available to Pettit in prison. *Id.* at 603, 661 P.2d at 769.

225. *Id.*

226. *Id.*

D. Misuse of PTSD in Criminal Proceedings

1. Fabricated defenses

Unfortunately for defendants who truly do suffer from PTSD, it seems to be an easy defense to fabricate.²²⁷ Once it is known that some defendants are asserting the disorder simply because it is new and convenient or because they think service in Vietnam will excuse their criminal behavior, it is not surprising if courts become skeptical.

A prime example of a faked PTSD defense is *People v. Lockett*.²²⁸ In *Lockett*, the defendant was charged with eighteen counts of robbery. He pleaded not guilty by reason of insanity based on PTSD. As the state had the burden of proof on the sanity issue, the people conceded they could not disprove the defendant's claim and accepted his plea.²²⁹ However, after accepting the plea, the prosecution was able to obtain Lockett's military records and discovered that he had never been in Vietnam. His entire service career was spent at Randolph Air Force Base in Texas as an accounting clerk.²³⁰ The truly frightening aspect of *Lockett* is that prior to the discovery of the defendant's fraud, he had been examined by several psychiatrists and repeatedly diagnosed as suffering from

227. Walker & Cavenar, *supra* note 25, at 176. Because of the similarities between PTSD and antisocial personality disorder, it is quite possible for a person with antisocial personality disorder to fake PTSD. *Id.* It is critical that the two be distinguished in that personality disorders are not generally considered to be "mental illness," particularly in a legal context. "Antisocial personality" is merely the newest term for sociopath. Sadoff, *Basic Facts about Mental Illness*, in LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 163, 171 (P. Friedman, ed. 1979).

Another reason PTSD is easy to simulate is that the diagnosis depends upon the veteran's own report of his symptoms and assumes that he is being truthful. Raifman, *Problems of Diagnosis and Legal Causation in Courtroom Use of Post-Traumatic Stress Disorder*, 1 BEHAV. SCI. & L. 115, 121 (1983). To further complicate matters, brochures listing the symptoms of PTSD have been distributed to veterans by national service organizations and outreach centers. Atkinson & Henderson, *supra* note 27, at 1119. "Rarely before have many claimants presented themselves to psychiatric examiners having read printed symptom checklists describing diagnostic features of the disorder [they are claiming]." *Id.* Thus, a thorough examination and history are critical to an accurate diagnosis. See Walker, *supra* note 28, at 1385; Lipkin, *supra* note 14, at 56, for recommendations on proper diagnostic procedure for PTSD cases. Objective documentation of the veteran's military history is also highly recommended. Lipkin, *supra* note 14, at 64-65; see *infra* text accompanying notes 228-31.

228. 121 Misc. 2d 549, 468 N.Y.S.2d 802 (N.Y. Sup. Ct. 1983).

229. *Id.* at 550, 468 N.Y.S.2d 804. On the issue of sanity, the party who bears the burden of proof and the quantum of proof necessary, varies from jurisdiction to jurisdiction. New York follows a modified version of the rule in *M'Naghten's Case*: the burden is on the prosecution to prove the defendant's sanity beyond a reasonable doubt. HEARING TRANSCRIPT, *supra* note 103, at 43, exhibit 1. As a general rule, if the burden is on the defendant, the standard is by a preponderance of the evidence; if the burden is on the state, the standard is beyond a reasonable doubt. See HEARING TRANSCRIPT, *supra* note 103, at 43, exhibit 1.

230. *Lockett*, 121 Misc. 2d at 553, 468 N.Y.S.2d at 806.

PTSD.²³¹

In *State v. Simonson*,²³² the defendant was equally unsuccessful in his attempt to misuse PTSD. Simonson was convicted of two counts of first-degree murder and one count of attempted murder for shooting several co-workers.²³³ Although the defendant pleaded not guilty by reason of insanity based on PTSD and exposure to Agent Orange, the state was able to introduce evidence that Simonson had bragged to his friends that he could do anything he wanted and get away with it because he had been in Vietnam and exposed to Agent Orange.²³⁴ Fortunately, the defendant was wrong; he was convicted. However, it is interesting to speculate what would have happened if he hadn't been so foolish as to advertise his intentions—he truly had been in Vietnam and two psychologists who worked with Vietnam veterans testified that he was suffering from PTSD.²³⁵

2. PTSD is easier to use than traditional mental illness defenses

PTSD could well be a mecca for criminal defendants. Dissociative disorders have long been a common basis for an insanity defense; yet, dissociative disorders themselves are fairly rare.²³⁶ This may, to a certain

231. The defendant was examined by six different psychiatrists. Two doctors found Lockett incompetent to stand trial and both a defense and a prosecution psychiatrist diagnosed him as suffering from PTSD. *Id.* at 551-52, 468 N.Y.S.2d at 804-05.

232. 100 N.M. 297, 669 P.2d 1092 (1983).

233. *Id.* at 298, 669 P.2d at 1093. On the night of the shootings, Simonson left work early complaining that he was ill. He returned with a shotgun and a pistol approximately two and one half hours later. After telling a co-worker (Killingsworth) "I'm going to kill Maruch, . . . and I'll have to shoot Howard, too, because Howard will be a witness and I can't have no witness," Simonson climbed out of his truck and started firing. Maruch was wounded and two other workers were killed. *Id.* at 298-99, 669 P.2d at 1093-94 (omission in the original).

234. *Id.* at 299, 669 P.2d at 1095, 1097. The state's expert, Dr. Engleman, testified that one of Simonson's co-workers, Killingsworth, had told him that Simonson had made these statements. The testimony was stricken as hearsay. *Id.* at 300-01, 669 P.2d at 1095-96. However, another co-worker of Simonson's testified that Simonson had made similar statements to him. This testimony was admitted. *Id.* at 302, 669 P.2d at 1097.

235. *Id.* Although it is possible that the psychologists were correct about Simonson suffering from PTSD, it is quite obvious that the murders and the defense were premeditated. It is possible that Simonson had PTSD which exhibited itself in antisocial behavior. See *supra* text accompanying note 19. However, he might also simply have been a sociopath. See *supra* note 227 and accompanying text. In either event, it is evident that Simonson did not fit any definition of legal insanity.

236. Cleary, *Dissociative States-Disproportionate Use as a Defense in Criminal Proceedings*, 4 AM. J. FORENSIC PSYCHIATRY 157, 157 (1983) ("Dissociative disorders, or, hysterical neuroses, dissociative type, rarely seen in clinical practice, appear to be diagnosed with some frequency in criminal defendants, particularly in those charged with homicide.").

PTSD is not a dissociative disorder but an anxiety disorder. DSM III, *supra* note 14, at

extent, account for the infrequent success of insanity defenses.²³⁷ But PTSD is not rare,²³⁸ and neither are criminal defendants who are Vietnam veterans.²³⁹ Thus, PTSD may present an insanity defense which is more believable and which may be easier to prove in a legal context. PTSD, unlike other disorders, does not require a predisposition to mental illness,²⁴⁰ and also unlike other disorders, allows the defendant to introduce evidence concerning the development of the disorder that is understandable to a jury. Rather than being subjected to large amounts of technical information, medical terms and theories, the jury will be able to hear about a specific incident in the defendant's life which was the cause of his problems.²⁴¹ The defendant may also be able to introduce testimony from his family and friends concerning the changes in his personality since his return from Vietnam—testimony designed to evoke sympathy from a jury.

VI. ALTERNATIVES TO PRESENT PRACTICES

PTSD presents a moral as well as a legal problem. If a Vietnam veteran is committing crimes because of a mental illness which is a result of his service in Vietnam, then society has a moral responsibility to assist the veteran. Thus far, much has been done following the recognition of PTSD. The Veterans Administration has set up counseling and treatment programs, and storefront counseling centers have been opened nationwide.²⁴² These programs, however, help only the veteran who is not incarcerated. What of the veteran already in prison or already engaged in criminal conduct? Can we as a nation afford to forget him? A middle

18. However, the dissociative states sometimes found in PTSD are the same as dissociative states found in dissociative disorders. *Id.* at 236.

237. REPORT, *supra* note 90, at 14-15 (1983). ("The Commission concludes . . . that the insanity defense trial is an extremely rare event and a successful insanity defense is even more rare.")

238. It has been estimated that 500,000 to 700,000 Vietnam combat veterans suffer from PTSD. Walker, *supra* note 28, at 1385. See *supra* text accompanying note 34.

239. See *supra* text accompanying notes 35-37.

240. Lipkin, *supra* note 14, at 53. PTSD is a break with classic psychoanalytical thinking because a diagnosis of PTSD does not require that the person have an underlying predisposition to mental illness. *Id.*

241. Milstein & Snyder, *The War is Over, The Battle Goes On*, TRIAL, Jan. 1983, at 86, 86-87; Erlinder, *supra* note 7, at 38. A judge or jury is more likely to identify with a specific event that caused the defendant's problems than with the technical language and uncertain causes often found in testimony concerning mental illness.

242. There are currently approximately 150 "vet centers" across the nation for counseling veterans with PTSD. Another 52 have been funded and are scheduled to open soon. Telephone interview with Bruce Pentland, Social Work Associate, Veterans Administration, Brentwood, Cal. (May 1985).

ground is needed which lies somewhere between abandoning those for whom the help came too late and bending the laws of criminal responsibility beyond recognition.

California has taken a step toward finding this middle ground by enacting Penal Code section 1170.9.²⁴³ Section 1170.9 allows a convicted Vietnam veteran who suffers from a drug abuse or mental problem to be transferred to a federal prison for treatment.²⁴⁴ Enacted in 1982, section 1170.9 is the result of a request by Judge Duane Martin of the San Joaquin Superior Court.²⁴⁵ The stated purpose of the bill is "to provide help not available in state prison to Vietnam veterans suffering from their military experience."²⁴⁶

The statute is an excellent start. It recognizes that many veterans need help that cannot be obtained in state prisons and differentiates those veterans from the rest of the criminal population. However, the statute is limited, first, in that it is one state's solution to a national problem and, second, in that it is dependent upon the agreement of the federal government. The federal government has not made an express commitment to receiving these veterans and the success of section 1170.9 depends upon its cooperation. As long as the federal prisons are free to accept or reject a California veteran, the solution will remain tentative. Should a federal facility refuse a veteran prisoner, he must remain in state prison. This is not a particularly desirable result if his crime is a result of a mental disorder which was insufficient to sustain a plea of insanity under California's

243. CAL. PENAL CODE § 1170.9 (West Supp. 1985).

244. California Penal Code § 1170.9 states:

In the case of any person convicted of a felony who would otherwise be sentenced to state prison the court shall consider whether the defendant was a member of the military forces of the United States who served in combat in Vietnam and who suffers from substance abuse or psychological problems resulting from that service. If the court concludes that the defendant is such a person, the court may order the defendant committed to the custody of federal corrections officials for incarceration for a term equivalent to that which the defendant would have served in state prison. The court may make such a commitment only if the defendant agrees to such a commitment, the court has determined that appropriate federal programs exist, and federal law authorizes the receipt of the defendant under such conditions.

CAL. PENAL CODE § 1170.9 (West Supp. 1985).

245. SENATE COMM. ON JUDICIARY, VIETNAM VETERANS—TRANSFER TO FEDERAL PRISON, AB 2989, Reg. Sess. (1981-82). Judge Martin stated:

[T]here is, at present, no federal help available and no meaningful state help either for [convicted veterans suffering combat related psychological disability] All I ask . . . is that Congress [and the Legislature] give opportunities to judges like myself to divert [veterans] out of the state prison system to the federal system so that [they] can be transferred to a more humane confinement and receive the type of counseling [they need]. If we can confine the Watergate prisoners and Patty Hearst in less demeaning prisons, cannot we at least do the same for [combat veterans]?

Id. at 2.

246. *Id.*

strict *M'Naghten* rule.²⁴⁷ Under the federal program he would have received treatment. Under a successful insanity plea he would have received treatment. But under these circumstances he receives only a prison sentence.

Additionally, if more states were to follow California's lead, the federal prisons would soon become overloaded with state prisoners. This would either necessitate the refusal of further state prisoners or completely undermine the effectiveness of available treatment programs. Thus, one possible solution is for treatment to be offered in all prisons.

As Vietnam veterans suffering from PTSD developed the disorder as a result of service to their country, it is incumbent upon their country, on a national level, to assist them. Although federal prisons cannot possibly house all prisoners who are Vietnam veterans, other possibilities are available.

Veterans Administration counseling programs could be instituted in all prisons. Although this is being accomplished in some places, it is not actually authorized by the Vet Centers' enabling legislation.²⁴⁸ A program within the prisons would allow veterans serving time to receive the help necessary for their successful return to society. These are the truly forgotten veterans. By the time many are released the present PTSD programs will have expired.²⁴⁹ These vets will once again be on the outside, with the same problems, yet without help.

A second possible solution is the development of a more uniform and systematic application of PTSD as a sentencing factor. If the veteran is eligible for any sort of alternative sentencing, treatment opportunities should be considered. Many veterans will not otherwise receive treatment. Although all prisons provide for the transfer of mentally ill prisoners to state hospitals, the resources are limited²⁵⁰ and most veterans will never be transferred.²⁵¹

247. See *supra* note 70 and accompanying text.

248. Veteran's Health Care Amendments of 1979, Pub. L. No. 96-22, 93 Stat. 47 (1979). Because the legislation does not authorize the vet centers to go into the prisons, such action could jeopardize the rest of the program by exceeding what Congress has authorized. The Veterans Administration in Brentwood, California, however, does have about 20 programs in 15 different correctional facilities in California. This program is well known and not connected with the vet centers. Telephone conversation with Bruce Pentland, *supra* note 242; see also Erlinder, *supra* note 7, at 47.

249. The current vet center program was originally scheduled to expire in September 1984. It has been extended through 1988. Telephone conversation with Bruce Pentland, *supra* note 242. By 1988, the program will have been in existence for eight and one half years. Congress may or may not extend the program for an additional period of time.

250. REPORT, *supra* note 90, at 27; see also 18 U.S.C. 4241 (1982).

251. Even defendants who are found "guilty but mentally ill," under the new verdict in use

A third possible solution is a reexamination of the rules applicable to the granting of a new trial based on the discovery of new evidence, when such evidence is a recent diagnosis of PTSD. A veteran who is diagnosed as having PTSD is in a vastly different position as far as criminal responsibility than one who is diagnosed as having a personality disorder. Personality disorders are not considered to be the type of mental illness which can excuse legal responsibility or even be considered as a mitigating factor.²⁵² This is not to suggest that every veteran who finds a doctor who will diagnose PTSD should be granted a new trial. But if sufficient evidence of PTSD is presented by mental health experts who are experienced in dealing with the disorder, the veteran's claim should not be dismissed on the grounds that he waived an insanity defense or that he knew before trial that he had problems. His claim should be fully evaluated to determine whether the veteran has a meritorious defense. Procedural rules should not be permitted to bar a defense which was unavailable at the time of trial. As PTSD could not have been diagnosed prior to 1980, it is unique among mental illnesses. This is as much new evidence as the proverbial death bed confession of the true criminal.

VII. CONCLUSION

This Comment has examined PTSD in Vietnam veterans: Its possible causes and manifestations, and its uses in a criminal law context. Although studies to date are very limited, and conclusive data does not yet exist to directly link PTSD to criminal conduct, present statistics do show an inordinate number of Vietnam veterans in the American criminal justice system. This Comment has examined the three most prevalent ways that PTSD comes into play in the criminal justice system—as the basis of a defense, as grounds for a new trial, and as a mitigating factor in sentencing—and has concluded that its use by criminal defendants is fraught with peril. PTSD is both easy to use in a criminal context and difficult to fit into existing legal molds. The disorder's causes and symptoms, even its very nature, are likely to evoke strong emotions from judge and jury—emotions which may or may not be the ones the defendant is seeking to evoke.

PTSD in Vietnam veterans, unlike other mental disorders, is not the problem of the individual defendant, but the problem of the nation and as such, it demands attention. Therefore, this Comment urges a more

in several states, do not necessarily receive treatment, but rather often find themselves "just another inmate." Slovenko, *Commentaries on Psychiatry and Law: "Guilty But Mentally Ill,"* 10 J. OF PSYCH. & LAW, 541, 546 (1982).

252. Sadoff, *supra* note 227 at 171.

uniform approach to dealing with PTSD in criminal trials. Courts and legislatures alike must be educated as to the realities of PTSD. Individual misconceptions and prejudices should not be permitted to affect defendants' chances of receiving a fair trial and adequate treatment, while those who do not suffer from PTSD or whose PTSD is not related to their criminal conduct should not be able to escape punishment because they were able to fabricate a defense.

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